(82)

SHDKT PROCEEDINGS AND ORDERS DATE: [03/15/95]

CASE NBR: [94100329] CFX STATUS: [GRANTED]
SHORT TITLE: [Rosenberger, Ronald, et al.]
VERSUS [Rector and Visitors, et al.] DATE DOCKETED: [082294]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Aug 22 1994	G	Petition for writ of certiorari filed.
2	Sep 21 1994	G	Motion of Intercollegiate Studies Institute for leave to file a brief as amicus curiae filed.
4	Sep 21 1994	G	Motion of Christian Legal Society, et al. for leave to file a brief as amici curiae filed.
3	Sep 22 1994		Brief of respondents Rector and Visitors of the University of Virginia, et al. in opposition filed.
5	Sep 28 1994		DISTRIBUTED. October 14, 1994 (Page 26)
6	Sep 29 1994	X	Reply brief of petitioners filed.
8	Oct 24 1994		REDISTRIBUTED. October 28, 1994
9	Oct 31 1994		Motion of Intercollegiate Studies Institute for leave to file a brief as amicus curiae GRANTED.
10	Oct 31 1994		Motion of Christian Legal Society, et al. for leave to file a brief as amici curiae GRANTED.
11	Oct 31 1994		Petition GRANTED.

PREVIOUS 1 1 EXIT

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PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
21	Dec 14 1994		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
12	Dec 15 1994		Brief amicus curiae of Intercollegiate Studies Institute filed.
13	Dec 15 1994		Brief amicus curiae of American Center for Law & Justice filed.
14	Dec 15 1994		Brief amicus curiae of Commonwealth of Virginia filed.
15	Dec 15 1994		Brief amicus curiae of Student Press Law Center filed.
16	Dec 15 1994		Brief amici curiae of Christian Legal Society, et al. filed.
17	Dec 15 1994		LODGING consisting of twenty copies of the following publications: The Yellow Journal, Volume 1,#3, Thoughtlines, Vol.16, No.2,(Fall 1990), "A Christmas Story No. 2" submitted by counsel for amici curiae, Christian Legal Society, et al.
18	Dec 15 1994		Joint appendix filed.

2 pp

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	DATE	NOTE	PROCEEDINGS & ORDERS
19	Dec 15 1994		Brief of petitioners Ronald Rosenberger, et al. filed.
22	Dec 15 1994		LODGING consisting of twelve sets, each containing three copies of Wide Awake magazine,and twenty separate copies of Al-Salam newsletter (February 1992 issue) submitted by counsel for petitioners and respondents.
23	Dec 21 1994		SET FOR ARGUMENT WEDNESDAY, MARCH 1, 1995. (1ST CASE).
24	Dec 21 1994		CIRCULATED.
25	Jan 12 1995		Brief amicus curiae of Pacific Legal Foundation filed.
30	Jan 13 1995	X	Brief amici curiae of Baptist Joint Committee on Public Affairs, et al. filed.
26	Jan 17 1995		LODGING consisting of twenty copies of Al-Salam Newsletter (February 1993 issue) submitted by counsel for the respondents.
27	Jan 17 1995	X	Brief of respondents Rector and Visitors of the University of Virginia, et al. filed.

Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
28	Jan 17 1995	X	Brief amicus curiae of National School Boards Association filed.
29	Jan 17 1995	X	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
31	Jan 17 1995	X	Brief amicus curiae of Council on Religious Freedom filed.
32	Jan 17 1995	X	Brief amici curiae of American Civil Liberties Union, et al. filed.
33	Feb 7 1995		Record filed.
		*	Original record proceedings United States District Court for the Western District of Virginia.
34	Feb 8 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit.
35	Feb 15 1995	X	Reply brief of petitioners filed.
36	Mar 1 1995		ARGUED.

FILED

94 329 AUG 2 2 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. MCCONNELL *
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W., 260
Washington, D.C. 20036
(202) 833-8400, ext. 102

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

101 pp

QUESTION PRESENTED

Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Ronald W. Rosenberger, as a member of Wide Awake Productions and as Editor-in-Chief of *Wide Awake* magazine;[1] Gregory W. Mourad; and Robert J. Prince.[2]

Respondents:

The Rector and Visitors of the University of Virginia; Edward E. Elson; W.L. Lyons Brown, Jr.; Robert G. Butcher, Jr.; N. Thomas Connally, M.D.; Hovey S. Dabney; Waller H. Horsley; J. Thomas Hulvey, M.D.; Evans B. Jessee; Patricia M. Kluge; Arnold H. Leon; Leigh B. Middleditch, Jr.; Elizabeth D. Morie; Freddie W. Nicholas, Sr.; S. Buford Scott; Jessie B. Wilson, III; Thomas E. Worrell, Jr.; Adam S. Arthur; Alexander G. Gilliam, Jr.[3]; and Ronald J. Stump.[4]

---

[1] Wide Awake Productions is an unincorporated Contracted Independent Organization of the University of Virginia which publishes *Wide Awake* magazine. It has no parent companies or subsidiaries.

[2] Petitioners Rosenberger, Mourad and Prince sued below both on their behalf and on behalf of other students at the University of Virginia similarly situated.

[3] Petitioners sued the foregoing individual respondents in their official capacities as members of the Rector and Visitors of the University of Virginia.

[4] Petitioners sued respondent Stump in his capacity as Associate Dean of Students of the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia.

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OCTOBER TERM, 1994

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RONALD W. ROSENBERGER, *et al.*,
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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners Ronald W. Rosenberger, Wide Awake Productions, *Wide Awake* Magazine, Gregory W. Mourad, and Robert J. Prince respectfully petition for a writ of certiorari to review the decision of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-42a) is reported at 18 F.3d 269. The opinion of the District Court (Pet. App. 43a-58a) is reported at 795 F. Supp. 175.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1994. A timely petition for rehearing with a suggestion for rehearing in banc was denied on May 23,

1994. See Pet. App. 59a-60a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND UNIVERSITY GUIDELINES INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, this case involves the Student Activity Fee Statement of Purpose and Funding Guidelines of the University of Virginia, which are set forth in full at Pet. App. 61a-67a.

STATEMENT OF THE CASE

This case involves the refusal of the University of Virginia to subsidize the printing costs of a student publication, called *Wide Awake,* solely and expressly because the viewpoint articulated by the publication is religious. The court below agreed with the students that the University regulation forbidding funding of religious activities "places a presumptively unconstitutional condition upon access to government benefits in violation of the Free Speech and Press Clause of the First Amendment," but held that this presumptively unconstitutional discrimination is required by the Establishment Clause. Pet. App. 39a. The facts are uncontested.

A. The Student Activities Fund

Through its Student Activities Fund ("SAF" or "Fund"), the University of Virginia supports a "wide variety of student organizations, activities, and publications" (Pet. App. 2a). In academic year 1990-91 (the year this case arose), the University provided funds to 118 student groups, including some 15 student-written and -edited newspapers and magazines, representing a broad range of interests and perspectives. *Id.* at 4a. The Fund is financed by a mandatory student activities fee of $14 per semester, paid by each full-time student. Petitioners, like other students, are required to contribute to this fund.

Respondents, the Rector and Visitors of the University, exercise legal control and authority over the operation of the Fund. Pet. App. 3a; see Va. Code Ann. § 23-69, *et seq.* (1950). Respondents have delegated authority to allocate SAF monies to the Student Council, an elected student body, subject to review by the University's Student Activities Committee, chaired by a designee of the Vice President for Student Affairs. The decisions of these bodies must be made in accordance with Guidelines established by respondents, which are reproduced in the appendix to this petition, at Pet. App. 61a-67a. This case is a constitutional challenge to one provision of those Guidelines.

To qualify for funding, a student group must first attain the status of a "Contracted Independent Organization" ("CIO"). CIO status is available to any group that is composed in its majority of students, is managed by officers who are full-time students, keeps an updated copy of its constitution on file with the University, and signs an anti-discrimination disclaimer. Pet. App. 2a. CIOs are given access to University facilities, including meeting rooms and computer terminals, as well as the right to apply for student activity funds. The standard CIO agreement states that benefits provided to the group by the University "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contract or other acts or omissions, or that the University approves of the organizations' goals or activities." C.A. App. 68, see Pet. App. 2a-3a.

The Guidelines specify certain categories of student activity that are eligible for funding, as well as certain activities and types of organizations that are excluded from eligibility. Among the categories of student activity that "[t]he Rector and Visitors have determined [to be] relate[d] to the educational purpose of the University and thus . . . eligible for funding," are "student news, information, opinion, entertainment, or academic communications

media groups." Pet. App. 61a. The Guidelines prohibit the funding of religious organizations, fraternities, sororities, honor societies, political organizations, and organizations whose membership is exclusionary. A "religious organization" is defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* at 66a. The Guidelines also prohibit funding for the following purposes: payment of honoraria or similar fees, religious activities, social entertainment or related expenses, philanthropic contributions and activities, political activities, or activities that would jeopardize the University's tax exempt status. *Id.* at 62a-63a. A "religious activity" is defined as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." *Id.* at 66a.

Once an activity is deemed eligible for funding, the Guidelines prescribe the following criteria for allocating funds among eligible organizations: the size of the group, the University-wide benefit of the group's activities, and the group's financial self-sufficiency. Pet. App. 63a; 4a & n.2. After an organization is approved for funding, it submits expense vouchers to the Fund, which are paid only upon a determination that the particular expense is permitted. Funds do not go directly to the group. Pet. App. 4a.

During the academic years 1990-91, 343 student organizations qualified as CIOs, of which 135 applied for, and 118 received, student activity funds. Pet. App. 4a. Among the funded organizations were 15 publications, representing a wide range of differing perspectives on issues of concern to the student body. These included *The Declaration, Dialogue Magazine, The Journal of Law and Politics, Loki Science Magazine, Oculus, Seasons, Thoughtlines, The University Journal, The Virginia Advocate,* the *Virginia Environmental Law Journal, The Virginia Literary Review*, and *The Yellow Journal.* Pet. App. 4a n. 3. The record shows that the University funds student organizations that "express a variety of ideological

viewpoints, including but not limited to viewpoints which are inconsistent with or antagonistic to various religious beliefs." C.A. App. 59, ¶ 16.

Among the funded organizations were the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society. Pet. App. 4a. The Muslim Students Association Constitution states it has the purpose of "promot[ing] a better understanding of Islam to the University Communty." C.A. App. 119. Using SAF funds, it publishes a magazine entitled *Al-Salam,* which, according to the group's application, is intended to "focus" on "Muslim attitudes and reactions to current world issues" (Application § 2(a)(iii)), and contains, among other things, discussions of Islamic doctrine.[1] The Jewish Law Students Association By-laws state that its purposes are "[t]o encourage Jewish law students to participate in Jewish activities" and to "be a focal point for Jewish activities at the Law School." C.A. App. 125. The Constitution of the C.S. Lewis Society states that the purpose of the organization is to "promote interest in, and discussion of, various literary, moral, and philosophical topics, with a particular emphasis on the work of the 'Oxford Christians.'" C.A. App. 131. The University has stated that these organizations were funded not as "religious activities," but as "cultural activities." C.A. Br. Univ. 16.

B. Wide Awake Productions

In September, 1990, petitioner Ronald W. Rosenberger, an undergraduate student at the University of Virginia, joined with other University of Virginia students to form Wide Awake Productions. Wide Awake Productions is an unincorporated association with the stated purposes of (1) "publish[ing] a magazine of philosophical and religious expression," (2) "facilitat[ing] discussion which fosters an atmosphere of sensitivity to and tolerance of

[1] A copy of this magazine, as well as one other funded publication, were lodged with the Court of Appeals.

Christian viewpoints," and (3) "provid[ing] a unifying focus for Christians of multicultural backgrounds." C.A. App. 95, Pet. App. 5a. Wide Awake Productions publishes *Wide Awake: A Christian Perspective at the University of Virginia*, a nonprofit journal written and edited by student members of the organization. According to the editor's statement in the first issue, the magazine was started when the founders "realized that none of the fifteen student-run publications at the University provided a forum for Christian expression, and we decided to fill that void." C.A. App. 70. *Wide Awake* is not affiliated with any religious institution or denomination, and it allows any University student to join, without regard to sex, race, color, or religion. Pet. App. 6a.

As of June, 1992, the group had published three issues of the magazine, which are distributed free of charge to about 5,000 students on the campus of the University of Virginia. These issues form part of the record in this case.[2] As described in the editor's statement in the first issue, *Wide Awake* "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." *Wide Awake*, Nov./Dec. 1990, at 2. The lead cover story in the first issue was on the subject of racism. Other articles dealt with such subjects as fear of airplane travel, crisis pregnancy, C.S. Lewis' ideas about evil and free will, a lengthy interview with a professor of economics at the University, and a commentary on Biblical passages regarding the abundant life. The featured article in the second issue was entitled "Homosexuals: Can They Change . . . and Should They?" It also included an interview with a professor of mathematics at the University and articles about the "Price of Freedom," the importance of foreign missions, and the meaning of a passage in the Gospel of *John*. *Wide Awake* Mar./Apr. 1991. The

[2] There is no suggestion of mootness. Wide Awake Productions still exists and still seeks to participate in the Student Activities Fund.

third issue contained articles on eating disorders (entitled "From Calorie to Calvary"), a popular Christian musician, papal teaching on Marxism and the free market, an Augustian perspective on university pedogogy, and an alumnus' experiences as a missionary in Moldavia. *Wide Awake*, Sept./Oct. 1991. All of the issues contained book and music reviews and essays about aspects of student life; one included original poetry.

Petitioners do not dispute that *Wide Awake* constitutes a "religious activity" within the meaning of the Guidelines. Pet. App. 7a. As the Court of Appeals noted, the magazine is marked by "unflagging invocation of religious, specifically Christian themes" and "[t]he journal's pages are pervasively devoted to providing a 'Christian perspective' in printer's ink at the University of Virginia." *Id.*

C. The University's Refusal To Fund *Wide Awake*

Soon after its founding, Wide Awake Productions attained CIO status. It is undisputed that it conformed to all applicable, content-neutral funding eligibility requirements, as set out in the Guidelines, other than the prohibition relating to "religious activities." Specifically, *Wide Awake* falls within the category of a "student news, information, opinion, entertainment, or academic communications media group[]," one of the categories of student activity eligible for funding. In January, 1991, the organization submitted an application for funding in the amount of $5,862, to cover publishing costs.

On February 26, after examining the content of the first issue of the magazine, the Appropriations Committee of the Student Council denied petitioners' request. There is no dispute that the Appropriations Committee's decision was based solely on the content of the publication. Petitioners were sent a letter explaining the basis for the decision:

> In reviewing the request by Wide Awake Productions, the . . . Committee determined your organiza-

> tion's request could not be funded as it is a religious activity. This determination was made after reviewing your first issue of *Wide Awake*. In particular, the committee noted in your Editor's Letter that the publication was 'a forum for Christian expression' and a means 'to challenge Christians (in how) to live.'

Pet. App. 8a-9a. As the letter indicates, the sole basis for denial was that *Wide Awake* is a "religious activity." At no point has the University claimed that Wide Awake Productions has failed to satisfy any other prerequisite for eligibility for funding.

Wide Awake appealed the denial to the full Student Council on March 3, 1991. It contended that it met all applicable funding guidelines and that the Appropriations Committee's denial of funding on the basis of the magazine's religious perspective violated the Constitution. The Student Council denied the appeal and affirmed the Committee's decision without further comment. C.A. App. 101.

Wide Awake then appealed to the Student Activities Committee, a University committee. On April 15, 1991, in a letter signed by respondent Ronald J. Stump, Associate Dean of Students, the Committee affirmed the denial of funding. Stump wrote:

> After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake Productions and by [the] Student Council, the Committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from [the Appropriations Committee].

Pet. App. 9a-10a. This exhausted all internal avenues of appeal within the University.

D. Proceedings in District Court

Wide Awake Productions, *Wide Awake*, and three of its editors and members then filed suit in federal district court, pursuant to 42 U.S.C. § 1983, challenging the University's denial of funding on the basis of the religious viewpoint of their publication. They claimed, *inter alia*, that the University's categorical exclusion of otherwise eligible student publications, solely on the basis of religious perspective, violated their rights to freedom of speech and press, to free exercise of religion, and to equal protection of the law.[3] They sought declaratory and injunctive relief prohibiting the University from denying funding on the basis of the content or viewpoint of their publication, and compensatory damages of at least $5,862, the printing costs of the first issue. Respondents filed an answer maintaining, among other things, that the University's issuance and implementation of the Guidelines is within its broad discretion to allocate funds among student activities, and in the alternative that the University is legally prohibited, under the Establishment Clause, from providing financial assistance to "religious activities" such as *Wide Awake* magazine. C.A. App. 50. The parties filed cross-motions for summary judgment, and agreed, with minor exceptions,[4] that there were no disputed issues of material fact and that the case was ripe for summary disposition.

On May 20, 1992, the district court granted respondents' motion for summary judgment. The court held, *inter alia*, that application of the Guideline barring any

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[3] Petitioners also raised issues under Article I of the Constitution of Virginia and the Virginia Act for Religious Freedom, Va. Code Ann. §§ 57-1 to -2, but did not pursue those state law claims on appeal. Pet. App. 10a and 15a.

[4] Those exceptions had to do with whether, in addition to denying funding, the University refused *Wide Awake* access to certain University facilities. The district court ruled against *Wide Awake* on this claim (Pet. App. 53a n.8), and petitioners did not pursue it on appeal.

funding of "religious activities" did not result in viewpoint or content discrimination against petitioners' speech. Pet. App. 54a. While declining to decide whether the Establishment Clause would force the University to deny funding for petitioners' magazine, the court found that the University's "fear" of violating the Establishment Clause was a sufficient justification for the Guideline:

> [E]ven if the plaintiffs were correct in their assertion that funding Wide Awake would not violate Federal or State law, it is not the province of this court to second guess the legal judgments made by the University. So long as the University's Establishment Clause fears are reasonable, the Guideline restrictions must stand. Given the complexity of the law in this regard, this court has little trouble in finding that the Guideline restriction is a reasonable limit to access to funds. Further, the restriction is a reasonable response by the University to prevent excessive entanglement with religion.

Pet. App. 54a. The district court rejected petitioners' free exercise claim on the ground that it did not appear to the court that "any burden of constitutional magnitude" had been imposed on them, and that even if there were a burden on free exercise rights, it would be justified by the compelling state interest of avoiding violation of the Establishment Clause (Pet. App. 57a).[5] The court rejected petitioners' equal protection claim on the ground that petitioners had made no showing of discriminatory intent.

E. Proceedings in the Court of Appeals

The Court of Appeals reversed the district court's holding that the Guideline against funding "religious activities" does not discriminate on the basis of the content and

[5] At this point in the opinion, the district court did not explain why it concluded that funding the magazine would violate the Establishment Clause. Earlier in the opinion, it had declined to decide that question. Compare Pet. App. 54a with *id.* at 57a.

viewpoint of the publication; but it affirmed the judgment on the ground that the University has a compelling state interest in avoiding a violation of the Establishment Clause.

The Court of Appeals explained that in "forbidding funding for speech that meets the definition of 'religious activity,' but not for speech of other types, the SAF guidelines discriminate among speech on the basis of its content." Pet. App. 26a. This, the court held, is "presumptively unconstitutional." *Id.* at 39a. Although the government has no affirmative duty to subsidize exercise of a constitutional right, it may not "penalize exercise of constitutional rights by withholding from their possessors an otherwise discretionary benefit." *Id.* at 25a. The Guideline, however, "constitutes precisely such a penalty, because it restrains Wide Awake Productions from gaining access altogether to a funding source generally available to CIOs not engaged in religious expression." It "thus creates an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression." *Id.* at 26a. Absent "considerations of equal constitutional dignity," the Court of Appeals explained, the Guideline violates the constitutional principle that "when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner." *Id.* at 25a.

The court found, however, that the University's discrimination against religious speech is justified by its "compelling interest in maintaining strict separation of church and state," which is "derive[d]" from the Establishment Clause. Pet. App. 26a-27a; 39a. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the court concluded that inclusion of student publications within the program funded by the Student Activities Fund would violate the "effects" and "entanglement" tests. The court found that inclusion of "a publication so clearly engaged in the propagation of particular religious doctrines" would constitute a "patent Establish-

ment Clause violation." Pet. App. 35a. "It would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief." *Id.* On the other hand, the court was "unpersuaded that the primary effect of the guidelines restrictions, involving as they do only the direct allocation of public monies, would be to inhibit religion." Pet. App. 34a.

Moreover, it was the "entanglement" part of the *Lemon* test that the court found to be "most plainly implicated by this case." Pet. App. 35a. The court acknowledged that state universities "may not discriminate against [religious groups] based on the content of their speech" when "university *facilities*" are involved, but opined that "[d]irect monetary subsidization of religious organizations and projects . . . is a beast of an entirely different color." *Id.* at 37a (emphasis in original). According to the court, "providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake*'s Christian mission." *Id.* It would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." Pet. App. 38a. Moreover, "[t]he possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the University of Virginia," which the court stated is "a factor of recurring significance in the Supreme Court's jurisprudence surrounding *Lemon*'s 'excessive entanglement' prong." Pet. App. 37a.

In sum, the Court of Appeals held: (1) that the Free Speech and Press Clauses "presumptively" forbid discrimination against an otherwise eligible publication on the basis of its religious viewpoint, (2) that the Establishment Clause requires such discrimination, and—implicitly—(3) that the Establishment Clause trumps the Free Speech and Press Clauses. The court also affirmed the lower court's disposition of petitioners' equal protection claims.

Petitioners filed a petition for rehearing with suggestion for rehearing in banc. The petition was denied on May 23, 1994, Judges Widener, Niemeyer, and Luttig dissenting.

REASONS FOR GRANTING THE PETITION

Last Term, Justice O'Connor stated that this Court "should, in a proper case," reconsider decisions that require discrimination against "religion, religious ideas, religious people, or religious schools," and thus "bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion." *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring). See also *id.* at 2505 (Kennedy, J., concurring); *id.* at 2515 (Scalia, J., dissenting). This case provides an ideal opportunity for that reconsideration.

The University of Virginia provides funding on a neutral basis to student activities representing a wide range of opinions—118 organizations in all, including 15 newspapers and magazines. Included among these funded activities are "viewpoints which are inconsistent with or antagonistic to various religious beliefs." C.A. App. 59, ¶ 16. It is not disputed that, but for its religious character, petitioners' magazine, *Wide Awake*, would be eligible for funding under the Guidelines as a "student news, information, opinion, entertainment, or academic communications media group[]." It addresses many of the same subjects (including racism, homosexuality, music, books, and interviews with professors) addressed by other student media. But the University refuses to consider *Wide Awake* for funding, solely because it presents a religious perspective to the students at the University. The Court of Appeals recognized that this explicit discrimination on the basis of viewpoint would violate the Free Speech and Press Clauses if the viewpoint expressed were nonreligious (Pet. App. 26a; 39a); but it held that the Establishment

Clause compels the very discrimination that the other portions of the First Amendment prohibit.

The decision below thus raises two interrelated constitutional questions. First is the relationship between the Establishment Clause and the Free Speech and Press Clauses of the First Amendment: Does the Establishment Clause permit (and even require) discrimination against religious speech that would be unconstitutional in the case of controversial political, philosophical, or other nonreligious perspectives? The second involves the meaning of the Establishment Clause itself: Does the extension of generally available benefits to religious speakers, on neutral terms, along with a broad array of nonreligious speakers, violate the Establishment Clause? On both of these issues, as we will show below, the lower courts are in disarray.[6]

[6] Petitioners raised their constitutional claim under the Free Exercise and Equal Protection Clauses as well as the Free Speech and Press Clauses, and continue to do so. The Court of Appeals did not address petitioners' free exercise argument, which is based on the University's discrimination against religion. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993). Instead the court found—inexplicably—that it had been abandoned. Pet. App. 16a n.23. However, it was expressly preserved on appeal. C.A. Br. Pltfs at 18 n.3. The court rejected petitioners' equal protection claim on the ground that petitioners did not allege discriminatory intent. Pet. App. 41a. However, since the students' claim is based on unequal treatment pursuant to an expressly discriminatory classification (not on the differential impact of a facially neutral classification), there is no requirement of a separate allegation regarding the defendants' intent. Cf. *Washington v. Davis* 426 U.S. 229, 240-241 (1976) (requiring proof of discriminatory intent only in the context of a facially nondiscriminatory governmental policy). If this Court affirms the lower court's Speech and Press holdings, and reverses its Establishment holding, it will not be necessary to address these other claims separately. In petitioners' view, each of the relevant constitutional provisions requires the same outcome: the neutral treatment of religious speech. Although this Petition will focus on the Speech and Press Clauses, petitioners wish to preserve each of their constitutional claims.

A. THE COURTS ARE DIVIDED OVER THE SUPPOSED CONFLICT BETWEEN THE ESTABLISHMENT AND FREE SPEECH CLAUSES

It is well established that public universities may not deny funding to student groups or publications on the basis of their viewpoint. The leading case is *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988), in which the University of Arkansas refused to allow a student gay rights group to receive funds from the student activities fund. The Eighth Circuit held this denial of funding unconstitutional, reasoning that "a group has no right to funding; but when funds are made available, they must be distributed in a viewpoint-neutral manner." *Id.* at 366. See also *Brooks v. Auburn University*, 412 F.2d 1171 (5th Cir. 1969) (denial of funding to an anti-war speaker overturned); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (denial of funding to a racist student publication overturned).[7]

Under these precedents, if petitioners produced a magazine addressing such issues as racism, homosexuality, and international events—all subjects of major articles in the

[7] By the same token, courts have generally rejected the argument that the funding of controversial speakers or activities out of mandatory student activities funds violates the First Amendment rights of dissenting students, so long as the fund supports a "broad spectrum of university life and reasonable representation of the various aspects of student thought and action." *Larson v. Regents of the University of Nebraska*, 189 Neb. 688, 691 (1973). Accord, *inter alia*, *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 860, 16 Cal. Rptr. 181, 844 P.2d 500, *cert. denied*, 114 S. Ct. 181 (1993); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986); see generally Note, *Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994). Some of these decisions have permitted dissenting students to demand refunds of portions of the student activities fee that are used to support the expression of ideological viewpoints with which they disagree. That issue is not raised in this case.

first three issues of *Wide Awake*—from a gay rights, anti-war, or racist point of view instead of their actual Biblical Christian perspective, the University would unquestionably be required to extend them neutral treatment. But because petitioners' speech is religious, according to the University and the Fourth Circuit, a policy of discriminatory exclusion is not only permitted but required. "Because the First Amendment forbids government to promulgate policies 'respecting an establishment of religion,'" according to the court, "government is left no choice but to forswear financial support of the myriad forms of religious endeavor in which a student organization might engage." Pet. App. 38a.[8]

This decision puts the Establishment Clause on a collision course with the rest of the First Amendment. As the court below candidly admitted, the University's policy "creates an uneven playing field on which the advantage is tilted toward . . . wholly secular modes of expression," (Pet. App. 26a), and it "[p]enalizes exercise of constitutional rights" by religious students (*id.* at 25a). It strips religious speakers of the constitutional protection accorded to secular perspectives and points of view. It condones discrimination against—not neutrality toward—

[8] In fact, as the record shows, the University is not consistent in its treatment of "religious endeavor" but discriminates among the various religious viewpoints represented at the University of Virginia. For example, it funds the Muslim Students Association (including its magazine *Al-Salam*) and the Jewish Law Students Association. The University has defended this discrimination on the ground that these are "cultural" rather than religious groups (C.A. Br. Univ. 16). This appears to be a euphemism for "minority groups." Petitioners have absolutely no objection to the funding of these other organizations; we are delighted that they are permitted to participate in the SAF and believe that they enrich the life of the University community. But serious Christians are a minority at the University, too, and add to the diversity of opinions. The government simply may not allocate its funds so as to favor or disfavor one religion over another. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); see *Larsen v. Valente*, 456 U.S. 228, 244 (1982); *Kiryas Joel, supra.*

religion. But this, the Court held, is what the Establishment Clause requires.

Unfortunately, the decision below is not aberrational. Indeed, last February the Ninth Circuit held, in reasoning similar to that of the district court below, that the University of Hawaii properly excluded religious student groups from eligibility for student activity funds. *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994). Even before these decisions, lawyers and administrators of public universities all too often assumed that the Constitution compels (or at least permits) viewpoint discrimination against religious student speakers. These two recent decisions by federal appellate courts will undoubtedly reinforce and exacerbate that misimpression. If not reviewed and corrected by this Court, the free speech rights of religious students at public universities all over the nation could be imperiled.

Even in the narrow context of public university student activities funds, this case deserves the Court's urgent attention. The question arises at every public university that has a student activities fund and that has students who wish to engage in religiously-oriented speech activities—which is to say, at virtually every public university. Whether a university is now excluding religious expression and thus violating free speech rights (the approach taken by respondents), or whether it is including religious expression and thus facing potential Establishment Clause lawsuits, this is a constitutional issue that will not go away.[9] University students and administrators alike would gain by authoritative resolution of this recurring and contentious issue.

[9] In recent litigation, the University of Hawaii at Manoa was first sued by the ACLU demanding that it exclude religious student groups from its student activities funding. After entering into a consent decree to the satisfaction of the ACLU and enforcing it against religious students, the University was then sued by the excluded students. See *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994).

The supposed conflict between Establishment Clause doctrine and the viewpoint-neutral principles of the Free Speech and Press Clauses has divided the courts of appeals in a wide variety of factual contexts. Some courts, like the Fourth Circuit below, hold that the Establishment Clause either permits or compels discrimination against religious speakers that would be unconstitutional if their viewpoint were nonreligious.[10] Other courts, in conflict with the decision below, hold either that the Establishment Clause does not override free speech rights, or that the Establishment Clause is not violated by treating religious speakers in the same way that nonreligious speakers are treated.[11] Almost all of these decisions were themselves split, with distinguished judges on both sides. Thus, in addition to its immediate practical importance to public university administrators and students, this case provides an opportunity for this Court to address and clarify recurring issues of First Amendment law that now perplex and divide the lower courts.

[10] See, *e.g.*, *Tipton, supra*, 15 F.3d at 926 (upholding denial of student activity funds by a public university to a religious student group); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (prohibiting display of a religious symbol on public property that is "indisputably a traditional public forum," noting that under a contrary analysis "public forum doctrine would swallow up the Establishment Clause"); *Smith v. County of Albemarle*, 895 F.2d 953, 959-60 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990) (holding that a display conveying an endorsement of religion must be barred from "an otherwise available public forum"); *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992) (holding that Establishment Clause would override the academic freedom of a public university professor to express religious opinions in the classroom); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992) (resolving "tension" between a public school teacher's "right of expression" and a possible endorsement of religion by forbidding him to read silently from his Bible in the classroom); *Guidry v. Calcasieu Parish School Bd.*, 9 Relig. Freedom Rptr. 118 (E.D. La. 1989), *aff'd sub nom. Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990) (forbidding class valedictorian from expressing religious views in graduation speech).

[11] See, *e.g.*, *Good News/Good Sports Club v. School District of Ladue*, No. 93-2148, 1994 WL 328572 (8th Cir. 1994) (allowing student religious club access to neutral forum does not violate Establishment Clause); *Fairfax County School Bd. v. Fairfax Covenant Church*, 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994) (holding that a church may not be charged a higher rental for use of a public facility than is charged to a nonreligious organization); *Hedges v. Wauconda Community School District*, 9 F.3d 1295 (7th Cir. 1993) (holding the Establishment Clause does not justify restraints on student distribution of written materials at public school); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394-95 (11th Cir. 1993) (holding, in context of a private menorah display in the state capital, that "[i]n a true public forum, . . . the Establishment Clause cannot be used as a justification for content-based restrictions on religious speech"); *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994) (holding that private groups may display a religious symbol in a public forum); *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (same); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc) (same); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985) (same).

We urge this Court to take this opportunity to make clear, in no uncertain terms, that the Establishment Clause does *not* provide a legitimate (let alone a compelling) justification for denial of what would otherwise be the First Amendment rights of private speakers to be free of viewpoint discrimination. In the words of retired Justice William J. Brennan, the Establishment Clause must not be used "as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

B. THE COURTS ARE DIVIDED OVER THE CONSTITUTIONALITY OF NEUTRAL BENEFITS TO RELIGION

In addition to the conflict between the Establishment Clause and the other provisions of the First Amendment, the decision below raises issues under the Establishment Clause itself. The Court of Appeals held that neutral

funding of *Wide Awake* would both "advance" religion and bring about an excessive "entanglement" between government and religion. The court explained that "it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief." Pet. App. 35a. Noting that the publication "indefatigably" promotes Christian ideas and beliefs, the court stated that "[u]sing public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation." *Id.*

This approach conflicts with decisions holding that the equal participation of religious speakers in the benefits of a neutral government program is *not* an establishment of religion.[12] The principal difference is one of analytical focus. The Fourth Circuit focused specifically on the religious activity in question, and asked whether aid to that activity would advance religion. See Pet. App. 37a (referring to "a continuing annual appropriation for the benefit of a single religion"). By contrast, courts upholding the participation of religious speakers in public fora or other neutral benefits programs examine the *program as a whole*, and ask whether the government unconstitutionally advances religion by subsidizing a wide range of expressive activities, of which religion is only one. See e.g., *Good News/Good Sports Club, supra,* at *9. ("The primary or principal effect of the 1986 Use Policy was not the advancement of religion; rather, the primary effect was to establish a neutral forum for community and student groups to engage in the exchange of ideas."); see also other cases cited in note 11, *supra.*

In addition to conflicting with other lower court decisions, the decision below conflicts in principle with recent opinions of this Court holding that the extension of benefits to a broad class of recipients, religious as well as nonreligious, on a neutral basis, does not violate the Establishment Clause. See *Lamb's Chapel v. Center Moriches School District*, 113 S. Ct. 2141 (1993); *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Witters v. Washington Dep't of Services*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981). In each of these cases, the Court rejected the argument that the Establishment Clause compels the government to exclude religious speakers or organizations from generally available benefits that are extended neutrally, without regard to religion. As stated in *Texas Monthly*, "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." *Id.* at 14-15. See also *Zobrest*, 113 S. Ct. at 2467; *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 252; *Witters*, 474 U.S. at 487-88. Certiorari is warranted to review this conflict between the decision below and this Court's most recent opinions on the issue of benefits to religion.

In all candor, however, we must acknowledge that the decision below, while in conflict with the recent trend of decisions by this Court, finds support in older cases that have never been overruled or adequately distinguished. Instead of emphasizing *neutrality* toward religion, many of the older cases held that public resources must never be used to defray the costs of specifically religious speech, instruction, or activity. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (quoted by the court below at Pet. App. 35a) ("Aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting"); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) ("The State must be certain, given the Religion Clauses, that subsidized teachers do

[12] See cases cited in note 11, *supra.*

not inculcate religion."). See also *Aguilar v. Felton*, 473 U.S. 402 (1985); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

Much of the confusion and inconsistency in Establishment Clause jurisprudence comes from vacillation between these two conflicting lines of cases. Thus, according to the court below, the First Amendment requires neutrality with respect to access to public facilities (Pet. App. 36a-37a) and tax benefits (*id.* at 30a n.31), but discrimination with respect to "direct monetary subsidization" (*id.* at 37a; see *id.* at 30a n.31). The court offers no reason for this bifurcation of Establishment Clause doctrine. Apparently, its purpose is to distinguish *Widmar v. Vincent, supra* (forbidding discrimination against religious student groups in the use of public university facilities, and rejecting the argument that the Establishment Clause requires such discrimination), and *Texas Monthly, supra,* 489 U.S. at 14-15 (allowing tax subsidy of religious publication if it is extended neutrally). Even as a means of distinguishing inconvenient precedents, the court's attempt fails, since *Witters v. Washington Dep't of Services, supra*, 474 U.S. at 487-88, expressly upheld the provision of cash money for religious teaching in a religious institution, so long as the aid is " 'made available generally without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed towards religion" (quoting *Nyquist, supra,* 413 U.S. at 782-83 n.38).

More importantly, the arguments made by the University and the Fourth Circuit in this case are virtually *identical* to the arguments made by parties in *Lamb's Chapel, Mergens, Witters,* and *Widmar*, objecting to neutral treatment of religious groups in the cases involving public facilities and tax benefits. In each of these cases, this Court rejected the argument for discrimination against religious speakers and institutions, and it should do so here as well. Here, as in those cases, the claim that

equal access to public benefits "advances" religion (Pet. App. 35a) rings hollow when the same benefits are extended neutrally to all organizations, religious as well as secular, on a neutral basis; and the claim that such neutral treatment conveys an "endorsement" of the recipient's religion (*id.* at 38a [13]) is similarly unfounded. Indeed, by its funding of Islamic and Jewish activities, as well as both conservative and liberal student publications, the University demonstrates that no endorsement of the underlying philosophy of funded groups is intended or understood. By funding some 118 student organizations, of various and conflicting viewpoints, the University conveys only the "message" that it supports a robust exchange of ideas, and "advances" only the rights of students to speak their own minds and to hear a diverse range of opinion.[14] As this Court observed in *Mergens*: "the broad spectrum of officially recognized student clubs . . ., and the fact that . . . students are free to initiate and organize additional student clubs, counteract any possible message of official endorsement or preference for religion or a particular religious belief." *Mergens,* 496 U.S. at 252 (citations omitted). This is particularly true in a University setting, involving a student group tied to no particular church or religious denomination, where the "aid" goes directly to printers and suppliers rather than to the general coffers of the group.

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[13] Although it labeled the argument "entanglement," the Court of Appeals relied heavily on the claim that funding *Wide Awake* would convey an "endorsement" of its religious view. See Pet. App. 38a ("for the University to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values"). We contend this analysis is wrong.

[14] The University's standard CIO agreement states that the flow of benefits to a group "should not be *mis*interpreted as meaning . . . that the University approves of the organizations' goals or activities." C.A. App. 68; see Pet. App. 2a-3a (emphasis added).

Moreover, the Fourth Circuit's conclusion that inclusion of religiously oriented speech would "entangle" the government with religion (Pet. App. 36a-37a) is backwards. If the University wishes to bar all religious expression from funded student activities, it will be required to undertake the very monitoring and interference that the "entanglement" test is designed to ward against. See *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 272 n.11.

The supposed distinction between equal access to public facilities and tax benefits, on the one hand, and "direct monetary subsidization," on the other, bears no relation to the purposes and principles of the First Amendment. Access to facilities can be no less valuable to the group than any other form of assistance, and—assuming endorsement is the issue—might well convey more of an impression of "symbolic union" than mere money. See *Zobrest*, 113 S. Ct. at 2474 (Blackmun, J., dissenting). If the University had its own printing office, *Wide Awake* would be entitled to equal access under the decision below. It is hard to see why paying the costs of outside printing requires the opposite result.

We contend that the distinction between forms of aid is symptomatic of the two inconsistent understandings of the demands of the Establishment Clause in the context of generally available subsidy programs. The unconstitutional "advancement of religion" can be judged either against a baseline of neutral treatment or against a baseline of "no aid to religion"; but it makes no sense to move from one baseline to another in response to adventitious differences in factual surroundings or the forms of aid. At best, this doctrinal doublemindedness creates confusion and inconsistency in lower court judgments; more troubling, as in this case, it allows government officials and lower courts the discretion to choose between equal treatment of religion and discrimination.

The time has come to clarify this area of the law. If certiorari is granted in this case, petitioners will argue for

extension of the neutrality principle to all forms of generally available government assistance, so as to reconcile the conflict perceived by the Fourth Circuit between the Establishment Clause and the rest of the First Amendment. In our view, the government may not favor religion over nonreligion, except where appropriate as an accommodation of the free exercise of religion (see *Texas Monthly, supra*) and government agents or mouthpieces may not themselves engage in or promote religion (see *Bowen v. Kendrick*, 487 U.S. 589 (1988));[15] but religious individuals and institutions may share in government benefits extended to a wide array of beneficiaries on a nondiscriminatory basis.[16] "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring); accord, *id.* at 2502 (Kennedy, J., concurring); *id.* at 2510 (Scalia, J., dissenting); *Lee v. Weisman*, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring).

The issue is thus starkly presented: Does the Establishment Clause compel the government to exclude a religious publication from generally available benefits, solely on the basis of its religious viewpoint, where such discrimination would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious?

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[15] In *Kendrick*, grantees were given government money specifically for the purpose of communicating the government's desired message of adolescent sexual self-discipline, and Establishment Clause strictures applicable to government speech therefore applied to them. In this case, by contrast, the various student groups are responsible for their own expression, and the University of Virginia does not attempt to tell them what to say (except when their perspective is religious).

[16] In situations where religious voices would be dominant, restrictions may be needed; but in this case religious groups constitute only a handful of eligible organizations. See *Widmar*, 454 U.S. at 275.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL *
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W., 260
Washington, D.C. 20036
(202) 833-8400, ext. 102

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 92-1736

RONALD W. ROSENBERGER, as a member of Wide Awake Productions; WIDE AWAKE PRODUCTIONS; WIDE AWAKE MAGAZINE; GREGORY W. MOURAD; ROBERT J. PRINCE,

Plaintiffs-Appellants,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA; EDWARD E. ELSON; W.L. LYONS BROWN, JR.; ROBERT G. BUTCHER, JR.; N. THOMAS CONNALLY; HOVEY S. DABNEY; WALLER H. HORSLEY; J. THOMAS HULVEY; EVANS B. JESSEE; PATRICIA M. KLUGE; ARNOLD H. LEON; LEIGH B. MIDDLEDITCH, JR.; ELIZABETH D. MORIE; FREDDIE W. NICHOLAS, SR.; S. BUFORD SCOTT; JESSE B. WILSON, III; THOMAS E. WORRELL, JR.; ADAM S. ARTHUR; ALEXANDER G. GILLIAM, JR.; RONALD J. STUMP,

Defendants-Appellees.

Argued Nov. 30, 1992

Decided March 14, 1994

Before ERVIN, Chief Judge, WILLIAMS, Circuit Judge, and SPROUSE, Senior Circuit Judge.

OPINION

ERVIN, Chief Judge:

We must decide whether a state university's refusal to disburse monies from its student activities fund for the benefit of a student-run religious publication violates the First and Fourteenth Amendments to the Constitution. We hold that it does not.

I

A

The University of Virginia collects a mandatory student activities fee of fourteen dollars per semester, together with tuition payments, from each of its full-time students. The proceeds of the collection are deposited in the University's Student Activities Fund ("SAF"), which is used to support the wide variety of student organizations, activities, and publications that function at the University.

To qualify for student-activity-fee funds, a student group first must attain the status of a "Contracted Independent Organization" ("CIO") at the University. CIO status is available to any group that is composed in its majority of students, is managed by officers who are full-time students, keeps an updated copy of its constitution on file with the University, and signs an anti-discrimination disclaimer. CIOs are given access to University facilities, including meeting rooms and computer terminals, as well as the right to apply for student-activity-fee funds. The standard CIO agreement executed between qualified student groups and the University states that benefits provided to the groups by the University

> should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities.

As the corporate body responsible under state law for governing the institution,[1] the Rector and Visitors of the University of Virginia ("Rector and Visitors") wield ultimate decisionmaking power over the operation of the SAF. The Rector and Visitors have delegated responsibility for allocating SAF monies to the University's Student Council. A CIO seeking an SAF grant must submit a detailed application for funding to the Appropriations Committee, a subcommittee of the full Student Council, which approves or denies the request. Appeal from a denial of funding by the Appropriations Committee may be taken to the full Student Council. Upon the Council's affirmance of the Appropriations Committee's decision, a second appeal may be argued before the University's Student Activities Committee, a faculty body chaired by a designee of the Vice President for Student Affairs.

The decisions of each of these authorities with respect to awards of SAF monies must be taken in compliance with certain guidelines promulgated by the Rector and Visitors. The guidelines, adopted in 1970, charge the Student Council with administering the SAF "in a manner consistent with the educational purpose of the University as well as with State and Federal law." The guidelines prohibit several categories of student organizations from obtaining SAF funds, according to the nature of the organization and the purpose for which the funds would be used. Although they may attain CIO status, fraternities and sororities, political and religious organizations, and groups whose membership policies are exclusionary in nature are ineligible for SAF funding. The following ex-

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[1] *See* Va.Code Ann. §§ 23-69 to -85 (Michie 1985 & Supp.1993) (delegating to the Rector and Visitors responsibility for governing the affairs of the University, and setting forth procedures and policies for the execution of this duty).

penditures and activities also are excluded by the guidelines: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities.[2]

Once a student organization attains CIO status and becomes eligible for funding, the guidelines prescribe the following criteria for allocating SAF monies among CIOs: (1) the size of the group; (2) the University-wide benefits conferred by the group's activities; and (3) the group's financial self-sufficiency. After a student organization is approved for funding, it submits expense vouchers to the SAF, which are paid only upon a determination that a particular expense is fundable under the guidelines. SAF monies are not paid to the group, but are disbursed directly to the group's creditors to discharge the fundable expense.

For the academic year 1990-91, 343 student organizations qualified as CIOs. Of these 343 groups, 135 applied for SAF funding, and 118 were awarded SAF monies. Numbered among the funded organizations were fifteen student publications;[3] also included were the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society.

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[2] This case involves a challenge to the University's refusal to fund a student organization engaged in religious expression. Accordingly, we note that the guidelines offer definitions of the phrases "religious organization" and "religious activity." A "religious organization" is defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The guidelines define a "religious activity" as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality."

[3] These included, *inter alia*, *Declaration*, *Dialogue Magazine*, the *Journal of Law and Politics*, *Loki Science Magazine*, *Oculus*, *Seasons*, *Thoughtlines*, the *University Journal*, the *Virginia Advocate*, the *Virginia Environmental Law Journal*, the *Virginia Literary Review*, and the *Yellow Journal*.

B

In September 1990 Ronald W. Rosenberger, an undergraduate at the University, joined with other University students to found Wide Awake Productions. According to its constitution, Wide Awake Productions is an unincorporated association with the stated purposes of (1) "publishing a magazine of philosophical and religious expression"; (2) "facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"; and (3) "providing a unifying focus for Christians of multicultural backgrounds." Wide Awake Productions publishes *Wide Awake: A Christian Perspective at the University of Virginia* ("*Wide Awake*"), a nonprofit journal written and edited by the student members of Wide Awake Productions. As stated by Rosenberger, who serves as editor-in-chief of *Wide Awake*, the journal [4] was launched when the members of Wide Awake Productions "realized that none of the fifteen student-run

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[4] We note that the editors of *Wide Awake* would reject our use of the noun "journal" to describe their publication:

> We . . . chose to call our magazine a perspective instead of a journal or viewpoint. The word perspective embraces the idea of viewing a situation from a particular angle (in this case a Christian angle), rather than viewing a situation with a particular conclusion in mind (as a politically partisan magazine would do). Our perspective is a starting point, not a finish line.

Wide Awake: A Christian Perspective at the University of Virginia [hereinafter *Wide Awake*], Mar.-Apr. 1991, at 4. We employ the nomenclature "journal" herein not to cast doubt upon the editors' preference, but purely as a generic appellation; thus, for our purposes a "journal" is simply "[a] periodical containing articles of interest to a particular group . . . ." *Webster's II New Riverside University Dictionary* 656 (1988); "a periodical publication dealing with matters of current interest . . . ." *Webster's Third New International Dictionary* 1221 (1976). This usage comports with the editors' own description of *Wide Awake* as "a collection of articles exploring from within a Christian framework various issues, both of widespread general interest and of particular interest to Christians." *Wide Awake*, Mar./Apr. 1991, at 4.

publications at the University provided a forum for Christian expression," and decided to fill this perceived void. *See* "Letter from the Editor," *Wide Awake: A Christian Perspective at the University of Virginia*, Nov.-Dec. 1990, at 2. *Wide Awake* and Wide Awake Productions are not affiliated with any religious institution, and allow any University student to join without regard to sex, race, religion, or color.

At the time notice of the instant appeal was filed, three issues of *Wide Awake* had been published, with approximately 5,000 copies of each issue being distributed free of charge to persons on the University campus. According to editor Rosenberger's comments in the first issue, *Wide Awake*'s mission is twofold: "to challenge Christians to live, in word and deed, according to the faith they proclaim[,] and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* In furtherance of this mission, *Wide Awake* "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." *Id.*

The content of the three issues of *Wide Awake* published thus far forms part of the record in this case. The first issue's cover story, "Eracing Mistakes," offered Christian solutions for the enduring calamity of racism, *see id.* at 1, 12-14; other articles treated such diverse issues as "crisis pregnancy," Oxford Christian apologeticist C.S. Lewis's ideas about evil and free will, "beating stress," and "praying with a thankful heart," all written from an avowedly Christian stance. *See id.* at 4-5, 6-8, 15, 21. The featured contribution in the second issue, "Out of the Closet and Into the Light," addressed the question "How should the Church respond to homosexuals . . . and vice versa?" *See id.*, Mar./Apr.1991, at 1, 14-17. The second issue also included an interview with a Christian professor of mathematics at the University, an article on Christian missionary work throughout the world, and

two commentaries offering spiritual guidance (titled respectively "God's Word: A Spiritual Advantage," and "On Your Own: Hope and Spirit"). *See id.* at 5-7, 11-13, 20-21. The third issue contained articles about a University graudate's experiences as a missionary in Moldavia, eating disorders (titled "From Calorie to Calvary"), and a Christian musician ("Keith Green: Piano Man for Christ"). *See id.*, Sep.-Oct. 1991, at 5-7, 12-14, 18-20. Columns in all three issues reviewed newly released recordings of music of religious disposition.[5]

The plaintiffs do not dispute that in publishing *Wide Awake* they are engaged in a "religious activit[y]" as the SAF guidelines define the phrase.[6] Indeed, after reading its contents dispassionately, we are compelled to mark *Wide Awake*'s unflagging[7] invocation of religious, specifically Christian, themes. The journal's pages are pervasively devoted to providing a "Christian perspective" in printer's ink at the University of Virginia. *Wide Awake*'s editorial stance extends to its advertising sales: by the public release of the third issue represented in the record (dated September/October 1991), roughly eighty percent of the journal's five commercial and notice columns were given over to Christian churches or to busi-

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[5] *See* Michelle Carpick, "All Aboard," *in Wide Awake*, Nov.-Dec. 1990, at 16-17 (reviewing Annie Herring's album *Waiting for My Ride to Come*); Michelle Carpick, "Heart Toward Heaven," *Wide Awake*, Sept.-Oct. 1991, at 21 (reviewing Kim Hill's album *Brave Heart*); Fred Hopkins, "A Choice Cut," *Wide Awake*, Mar.-Apr. 1991, at 19 (reviewing *Chosen*, a newly released album by the "alternative" rock band The Violet Burning).

[6] *See supra* note 2.

[7] Careful perusal of *Wide Awake*'s three published issues suggests one exception to this generalization: a contribution titled "The Economics of Compassion," which examined Pope John Paul II's 1991 encyclical *Centesimus Annus*. The article discusses in a non-didactic manner the encyclical's "ringing denunciation of socialism" and its "support of the free market." *See* Greg Mourad, "The Economics of Compassion," *Wide Awake*, Sept.-Oct. 1991, at 8-11.

ness entities purveying goods and services of Christian bent.[8] Even *Wide Awake*'s physical appearance draws attention to its religious posture: the Christian symbol of the Cross lying in a dark oval field, is printed at the top of each page; another Cross marks the end of each contribution.

Wide Awake Productions attained CIO status shortly after its founding. Commensurate with this status, as the plaintiffs acknowledge, the University openly accords Wide Awake Productions the same access to University facilities as other CIOs. Such access includes the use of University property for the group's meetings, functions, and programs. CIO status affords the members of Wide Awake Productions liberal recourse to University computer terminals, printers, and other equipment employed in the preparation of manuscripts for publication.

In January 1991, Ronald W. Rosenberger, on behalf of Wide Awake Productions, submitted an application for SAF funding to the Appropriations Committee of the Student Council in the amount of $5,862.00, to cover publishing costs for *Wide Awake*. On February 26 of that year the Appropriations Committee denied Rosenberger's application, stating:

> In reviewing the request by Wide Awake Productions, the . . . Committee determined your organization's request could not be funded as it is a religious activity. This determination was made after reviewing your first issue of *Wide Awake*. In particular,

[8] These included notices and advertisements for the Christian Fellowship Church in Vienna, Virginia (noting times of scheduled Sunday services); The Christian Bookstore in Charlottesville, Virginia (promoting sales of the *NIV Study Bible*); The Center for Christian Study (location unspecified) (inviting full-time University of Virginia students to attend free of charge a weekly lecture and discussion series titled "Thinking Christianly"); and Trinity Presbyterian Church (location unspecified) (noting times of scheduled Sunday services). *See Wide Awake*, Sept./Oct. 1991, at 4, 10, 11, 21.

> the committee noted in your Editor's Letter that the publication was "a forum for Christian expression" and a means "to challenge Christians (in how) to live" . . . .
>
> Please be aware that this decision simply denies Student Activity Fee funding for your publication. Wide Awake Productions may still print and distribute issues on Grounds.[9]

The members of Wide Awake Productions promptly appealed the decision to the full Student Council on March 3, 1991, contending that their organization has satisfied all applicable SAF funding guidelines and that the Appropriations Committee's denial of funding violated the Constitution of the United States. The Student Council affirmed the Appropriations Committee's decision without comment.

Wide Awake Productions then appealed the Student Council's ruling to the University's Student Activities Committee. On April 16, 1991, Associate Dean of Students Ronald J. Stump informed Rosenberger of the Student Activities Committee's decision to affirm the funding denial. Stump wrote:

> After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake Productions and by [the] Student Council, the Committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from [the Appropriations Committee]. As noted in [that] letter, Wide

[9] The letter communicating the Appropriations Committee's decision to Rosenberger was sent over the signature of Cynthia J. Wilbricht, the Student Council's Vice President for Student Organizations.

> Awake Productions may still print and distribute copies of the magazine and as a CIO has full and equal access to other University facilities and services.

The Student Activities Committee's repudiation exhausted all internal avenues of appeal within the University for the institution's denial of SAF funding to Wide Awake Productions.

C

On July 11, 1991, the members of Wide Awake Productions brought this action against the Rector and Visitors and Dean Stump pursuant to 42 U.S.C. § 1983.[10] The plaintiffs' complaint set forth three challenges to the SAF guidelines' exclusion of "religious activities," including the publication of *Wide Awake*, from eligibility for funding consideration, each predicated upon provisions of the Constitution of the United States. To each of the plaintiffs' federal constitutional claims were appended alternative and supplemental claims seeking recovery under the provisions of Article I of the Constitution of Virginia[11] and, in the case of Count Two, under the Virginia Act for Religious Freedom, Va.Code Ann. §§ 57-1 to -2 (Michie 1985 & Supp.1993). The plaintiffs did not challenge directly the University's refusal to fund Wide Awake Productions, except insofar as the adverse funding decisions flowed directly from the requirements of the guidelines themselves.[12]

[10] 42 U.S.C. § 1983 reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[11] Article I of the Virginia Constitution comprises that charter's Declaration of Rights. *See* Va. Const. pmbl.; I A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 27-313 (1974).

Count One, the complaint's most comprehensive theory of recovery, alleged that the guidelines' proscription of SAF funding for the publication costs of *Wide Awake* violated the Free Speech and Press Clause of the First Amendment to the United States Constitution[13] and Article I, Section 12 of the Virginia Constitution[14] (1) by unlawfully depriving the members of Wide Awake Productions of government benefits solely because of the content and viewpoint of their speech in *Wide Awake;* and (2) by illegally excluding the members of Wide Awake Productions from the "limited public forum" created by the Rector and Visitors' establishment of the SAF and promulgation of the funding guidelines. Count One also contended that the guidelines' "definitions for allocating SAF funds to CIOs" are unconstitutionally vague because persons of ordinary intelligence must guess at their meaning, and unlawfully overbroad because they impinge constitutionally protected activity.

Count Two of the complaint maintained that the guidelines' denial of SAF funding to "religious activities" violated the Free Exercise Clause of the First Amendment to the Federal Constitution,[15] Article I, Section 16 of the

[12] The complaint did not challenge any of the University's procedures for administering the SAF, nor the discretionary authority vested by the Rector and Visitors in official student and University governing bodies with respect to SAF funding decisions.

[13] *See* U.S. Const. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech, or of the press" . . . .).

[14] Article I, Section 12 of the Virginia Constitution provides *inter alia* that "any citizen may freely speak, write, and publish his sentiments on all subjects," and that "the General Assembly shall not pass any law abridging the freedom of speech or of the press. . . ." Va. Const. art. I, § 12, cls. 2, 3.

[15] *See* U.S. Const. amend, I, cl. 2 ("Congress shall make no law . . . prohibiting the free exercise [of religion]" . . . .).

Virginia Constitution,[16] and the Virginia Act for Religious Freedom, Va.Code Ann. §§ 57-1 to -2 (Michie 1985 & Supp.1993),[17] by discriminating in the granting of a government benefit based upon (1) the religious content of the expression in *Wide* Awake; and (2) the religious beliefs, character, or affiliation of the members of Wide Awake Productions. Count Two also imputed to the Rector and Visitors "conduct constitut[ing] a failure to give reasonable accommodation to the plaintiffs' religious beliefs."

Count Three of the complaint alleged that the guidelines' prohibition against subsidizing "religious activit[ies]," coupled with the Rector and Visitors' denial of SAF funds to Wide Awake Productions, violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution[18] and the Anti-Discrimination Clause of Article I, Section 11 of the Virginia Constitution.[19] Specifically, Count Three contended (1) that the guidelines "den[ied] plaintiffs the benefits to which other students and CIOs are entitled" by unconstitutionally discriminating against Wide Awake Productions on the basis of the content or viewpoint of its members' speech and association; and (2) that the guidelines unconstitutionally discriminated against the plaintiffs' religious speech "by denying [them] the benefits that other students and CIOs engaged in religious speech and activities receive and have received. . . ." This viewpoint- and religious-based discrimination, Count Three maintained, was not justified by a compelling state interest, nor was it narrowly tailored to achieve whatever minimal interest the Rector and Visitors may have in refusing to fund student "religious activit[ies]."

The plaintiffs sought redress for their alleged injuries in the form of (1) a declaratory judgment that the guidelines' prohibition against the funding of "religious activities" violated their rights under the United States Constitution, the Virginia Constitution, and the Virginia Act for Religious Freedom; (2) a permanent order enjoining the Rector and Visitors from promulgating any proscription against the funding of Wide Awake Productions on the basis of the content or viewpoint of its members' speech in *Wide Awake*; (3) compensatory damages of at least $5,862.00, the sum of SAF funds unconstitutionally denied Wide Awake Productions; and (4) an order awarding Wide Awake Productions reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.[20]

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[16] Article I, Section 16 of the Virginia Constitution provides *inter alia* that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience," and that the Virginia General Assembly "shall not . . . confer any peculiar privileges or advantages on any sect or denomination. . . ." Va. Const. art. I, § 16, cls. 2, 6.

[17] After a lengthy preamble denouncing those who would force their religion upon others, the Virginia Act for Religious Freedom provides in pertinent part:

> "Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."

Va.Code Ann. § 57-1 (Michie 1985 & Supp. 1993).

[18] *See* U.S. Const. amend. XIV, § 1, cl. 4 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[19] Article I, Section 11 of the Virginia Constitution, provides *inter alia* "[t]hat the right to be free from any government discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." Va. Const. art. I, § 11, cl. 3.

[20] 42 U.S.C. § 1988 provides that

> [i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discre-

Agreeing that there were no material facts at issue, both parties sought summary judgment as a matter of law. After hearing oral argument on their opposing motions, the district court granted summary judgment in favor of the Rector and Visitors on each count of the plaintiffs' complaint, concluding (1) that the SAF was not a "limited public forum;" (2) that application of the funding guidelines did not result in viewpoint or content discrimination against the speech of Wide Awake Productions; and (3) that the denial of funding did not burden the plaintiffs' free exercise of religion. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 795 F.Supp. 175, 178-83 (W.D.Va.1992) (mem.). The court also held that the plaintiffs' equal protection challenge to the guidelines failed because the members of Wide Awake Productions had not adduced evidence of the Rector and Visitors' discriminatory intent. Although the district court did not scrutinize the complaint's allegations that the guidelines violated the Virginia Constitution and the Virginia Act for Religious Freedom, it held that the restrictions on funding for "religious activities" did not "impose an impermissible burden on the plaintiffs' exercise of their rights as guaranteed by . . . the State Constitution[], or the Virginia Act for Religious Freedom." *Id.* at 17.

This appeal followed.

II

Before addressing the substance of the plaintiffs' assignments of error, we wish to make clear what precisely is at issue in this appeal. The complaint alleges that the Rector and Visitors have violated rights guaranteed the plaintiffs by the Constitution of the United States, the Constitution of Virginia, and the Virginia Act for Religious Freedom. Two of these sources derive from the

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tion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

substantive law of the Commonwealth of Virginia. As such, they comprise fonts of individual liberties independent of the Federal Constitution, and are therefore susceptible of autonomous interpretation by the courts of the Commonwealth.[21] Although the district court embraced these pendent state-law claims in its favorable grant of summary judgment to the Rector and Visitors,[22] they were not controverted by the parties at the summary judgment hearing, and were not subjected to independent scrutiny on their merits below. We have no objective basis, therefore, upon which to assume that any interpretation of the Virginia Constitution or the Virginia Act for Religious Freedom contributed separately to the judgment from which this appeal was taken. The parties have not attempted to resuscitate them in their briefs or at oral argument. To bring grounds for relief to the attention of an appellate tribunal, the Federal Rules of Appellate Procedure oblige the parties to offer a written

> argument . . . contain[ing] [their] contentions . . . with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . and parts of the record relied on.

Fed.R.App.P. 28(a)(5), (b). We observe that none of the briefs filed by either party in this court contains "contentions" about the application of the Virginia Constitution's Declaration of Rights or the Virginia Act for Religious Freedom to the instant case, or "citations to . . . authorities" that might illuminate the special rights the state charter and religious-freedom statute are said to

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[21] *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 491, 498-504 (1977).

[22] *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 795 F.Supp. 175, 183 (W.D.Va.1992) (mem.) (holding that funding restrictions on "religious activities" do not impermissibly burden rights guaranteed by the Constitution of Virginia or the Virginia Act for Religious Freedom).

guarantee. We therefore are compelled to conclude that the parties have failed to appeal the district court's grant of summary judgment with respect to these state-law theories of recovery. Failure of this nature constitutes abandonment of the claims, and precludes us from considering them further herein. *See Shopco Distrib. Co. v. Commanding Gen.*, 885 F.2d 167, 170 n. 3 (4th Cir. 1989) (noting that failure to comply with terms of former version of Fed.R.App.P. 28(a)(5) constitutes waiver of asserted claims).

Therefore, the scope of our inquiry is confined to such of the plaintiffs' assignments of error as rest upon the Constitution of the United States. These are two.[23] First, the plaintiffs contend that the guidelines' proscription of SAF funding for "religious activities" violates the Free Speech and Press Clause of the First Amendment (1) by depriving them of government benefits based solely on the content and viewpoint of their speech in *Wide Awake*, and (2) by excluding them from the "limited public forum" represented by the SAF. Second, the plaintiffs argue that the guidelines' funding restrictions discriminate against them in contravention of the Equal Protection Clause of the Fourteenth Amendment (1) by denying them benefits which other CIOs engaged in religious speech and activities have received, and (2) because the restrictions serve no compelling state interest, and are not narrowly tailored to satisfy whatever minimal interest the Rector and Visitors may have in denying funding to "religious activit[ies]." In the discussion that follows, we

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[23] In granting the University's motion for summary judgment, the district court ruled that the denial of funding to Wide Awake Productions did not unconstitutionally burden the plaintiffs' free exercise of religion. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 795 F.Supp. 175, 178-83 (W.D.Va.1992) (mem.). Because the plaintiffs failed to assign error to this holding on appeal, it meets the same fate as the plaintiffs' state-law claims: we consider it abandoned, and decline to address it herein. *See* Fed.R. App.P. 28(a)(5); *Shopco Distrib. Co.*, 885 F.2d at 170 n. 3.

address these two claims in turn, reviewing the legal conclusions on which the district court granted summary judgment *de novo*. *See, e.g., Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1259 (4th Cir.1991).

III

First, we examine the plaintiffs' contention that the guidelines' proscription of SAF funding for "religious activities" violates the Free Speech and Press Clause of the First Amendment by depriving the members of Wide Awake Productions of government benefits based solely on the content and viewpoint of their speech in *Wide Awake*.

A

Because our decision rests ultimately upon our understanding of the language of the First Amendment, we here undertake cursory review of certain principles of constitutional interpretation that guide our deliberations.

Like our cultural and ideological ancestors the Magna Carta (1215) and the English Bill of Rights (1688), the first ten amendments to the Federal Constitution represent what Justice Story called "a solemn recognition of limitations upon the power of parliament; that is, a declaration, that parliament *ought* not to abolish, or restrict" certain fundamental rights of the person. III Joseph Story, *Commentaries on the Constitution of the United States* § 980, at 695 (1833). Taken as a whole, the provisions of the Bill of Rights form a stout bulwark against government encroachment upon the fundamental liberties of every person within the jurisdiction of the United States. The amendments weigh as a counterpoise to the specifically enumerated powers granted by the people of the several states to their national government in the first three Articles of the Federal Constitution.

By its terms the Free Speech and Press Clause of the First Amendment reflects the limiting purpose of the

Bill of Rights. The Clause pronounces the federal legislature's impotence to curb any individual's freedom to express verbally her views upon any subject; it states that Congress shall "make *no* law . . . *abridging* the freedom of speech, or of the press." U.S. Const. amend. I, cl. 3 (emphasis added). While the First Amendment thus represents a guarantee that freedom will be preserved in the face of legislative ambition, it goes no further. Although the Amendment preserves inviolate the individual's *right* to speak, it sustains speech itself only indirectly. The Speech and Press Clause cannot be metamorphosed into a promise that the federal government will purchase a bullhorn, paper, and ink for the convenience of every garrulous member of the American populace. The Constitution does not guarantee the American people the means of self-expression; it simply pledges that Congress (and, through application of the Fourteenth Amendment, the states [24]) will not enact laws or regulations restraining at its inception a person's right freely to speak her views and to disseminate them by every means at her disposal. A century and six decades after the publication of his commentaries on our national charter, Justice Story's expression of this principle retains all its peerless power:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild

[24] The Due Process Clause of the Fourteenth Amendment has been held to protect from infringement by the states all of the First Amendment liberties potentially at issue in this case: the freedoms of speech, *Fiske v. Kansas*, 274 U.S. 380, 387, 47 S.Ct. 655, 657, 71 L.Ed. 1108 (1927); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629-30, 69 L.Ed. 1138 (1925); press, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722-23, 51 S.Ct. 625, 633-34, 75 L.Ed. 1357 (1931); free exercise of religion, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); and non-establishment of religion, *Everson v. Board of Educ.*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-512, 91 L.Ed. 711 (1947).

> to be indulged by any rational man. . . . It is plain, then, that the language of the amendment imports no more, than that every many shall have a right to speak, write, and print his opinions upon any subject whatsoever, without prior restraint. . . .

Story, *supra*, § 993, at 703-04.

B

With these interpretative precepts firmly in hand, we turn to the assignment of error lodged by the plaintiffs.

The plaintiffs do not suggest that the Rector and Visitors have restrained them from speaking, writing, or printing commentary upon religious themes, or indeed upon any other subject, on the campus or within the purview of the University of Virginia. As they freely admit, Wide Awake Productions is afforded the full benefits of CIO status by the University. Its members are granted the same access to meeting rooms on University grounds as other CIOs, and are given generous run of University property for their work and programs. The University affords Wide Awake Productions liberal recourse to its computer terminals, printers, and other equipment used to prepare manuscripts for publication. With the University's full consent, the plaintiffs have thus far distributed several thousand copies of *Wide Awake* on University grounds. The plaintiffs do not, indeed cannot, suggest, therefore, that the Rector and Visitors have placed a per se unconstitutional prior restraint upon their freedom actually to speak or to publish their views by denying them equal access to University facilities. *Cf. Widmar v. Vincent*, 454 U.S. 263, 277, 102 S.Ct. 269, 278, 70 L.Ed.2d 440 (1981) (discussing erection of prior restraint against student organization's use of state university property); *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266 (1972) (same).

Nor is the plaintiffs' complaint simply that the Rector and Visitors have refused to pay for the publication of their speech with treasure from the University fisc. If such were the nature of this dispute, we might leave the field of independent analysis fallow. For there is no question that the Commonwealth of Virginia, like any private owner of property, may preserve the land and chattels under its control for the use to which they are dedicated, and decline to lend them for other purposes. *E.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, —— U.S. ——, ——, 113 S.Ct. 2141, 2146, 124 L.Ed. 2d 352 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 3447-3448, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). As agents of the Commonwealth, the Rector and Visitors need not subsidize extracurricular student activities in any form. *Healy v. James*, 408 U.S. 169, 182 n. 8, 92 S.Ct. 2338, 2346 n. 8, 33 L.Ed.2d 266 (1972). Having undertaken such subsidies, they need not have promulgated criteria by which the Student Council could differentiate between competing funding requests. Nor are the Rector and Visitors under any affirmative obligation to ensure that University students' expressive activities are funded. In language redolent of Justice Story's pointed commentary on the Speech and Press Clause, the Supreme Court has rejected the notion that the rights of freedom of speech and freedom of the press "are somehow not fully realized unless they are subsidized by the state." *Regan v. Taxation with Representation*, 461 U.S. 540, 546, 103 S.Ct. 1997, 2001, 76 L.Ed.2d 129 (1983).

The Student Council's exercise of discretion in withholding SAF monies from Wide Awake Productions is not, therefore, the basis of the plaintiffs' complaint. The plaintiffs contend, instead, that once the Rector and Visitors have chosen to promulgate guidelines governing the

allocation of funds that support student speech among competing student interests, such guidelines cannot condition funding awards on the content or viewpoint of a prospective recipient's speech. The Rector and Visitors have violated the First Amendment, the plaintiffs maintain, by denying them the benefit of a University-funded SAF grant on grounds that their publication of *Wide Awake* constitutes a "religious activit[y]" [25] within the meaning of the guidelines. Such discrimination contravenes the First Amendment, they assert, because it implicitly condemns the content and viewpoint of their speech in *Wide Awake*. This content and viewpoint discrimination imposes a prior restraint upon the ability of Wide Awake Productions to enjoy government largesse, and, the plaintiffs contend, must therefore be struck down.

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[25] The guidelines draw a distinction between "religious organizations" and "religious activities." "Religious organizations" are student groups whose whole or primary purpose is to practice devotion to an ultimate reality or deity; such groups are wholly barred from receiving SAF funds. "Religious activities," on the other hand, are forms of conduct or behavior that cannot, commensurate with the guidelines, be subsidized with SAF monies. The result of the guidelines' identification of these two categories, however, is the total proscription of SAF funding for all forms of religious endeavor by CIOs at the University.

When the Student Council's Appropriations Committee, and later the Student Activities Committee, informed Ronald W. Rosenberger that Wide Awake Productions would not be the recipient of SAF funds, they referred to the publication of *Wide Awake* as a "religious activity." It has not been suggested that the defendants rejected the funding request because Wide Awake Productions constitutes a "religious organization." Hence we assume with the parties that the denial of funding rested on a determination that *Wide Awake* was "an activity . . . primarily promot[ing] or manifest[ing] a particular belief(s) in or about a deity or an ultimate reality."

C

Having identified the constitutional character of the plaintiffs' first assignment of error, we proceed to seek its resolution.

The notion that, whenever a government benefit or privilege might be withheld altogether, it may be withheld on whatever conditions government chooses to impose, has been thoroughly repudiated by the Supreme Court since the middle of this century. *See, e.g., Sherbert v. Verner,* 374 U.S. 398, 405, 83 S.Ct. 1790, 1794-1795, 10 L.Ed. 2d 965 (1963); *Speiser v. Randall,* 357 U.S. 513, 518, 526, 78 S.Ct. 1332, 1338, 1342, 2 L.Ed.2d 1460 (1958); *see also* Laurence H. Tribe, *American Constitutional Law* § 11-5, at 781-84 (2d ed. 1988) (discussing "elusive" distinction between withholding a government subsidy for and imposing a penalty upon exercise of a constitutional right). Unconstitutional conditions, which make enjoyment of a government benefit contingent on sacrifice of an independent constitutional right, are *prima facie* invalid. For

> if the government could deny a benefit to a person because of his constitutionally protected speech . . . , his exercise of th[at] freedom[] would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972) (quoting *Speiser,* 357 U.S. at 526, 78 S.Ct. at 1342). Whether a condition is unconstitutional depends on whether the government may properly demand sacrifice of the particular right asserted in the context of its exercise. *FCC v. League of Women Voters,* 468 U.S. 364, 380, 395, 104 S.Ct. 3106, 3117, 3125, 82 L.Ed.2d 278 (1984).

We must decide whether the guidelines' prohibition against funding "religious activities" imposes an unconstitutional condition upon receipt of the government benefit inherent in an award of SAF monies by infringing the plaintiffs' claimed First Amendment right to indulge religious expression. This decision harbors a two-part inquiry. First, we must determine whether the publication of *Wide Awake* constitutes "speech" protected by the Speech and Press Clause of the First Amendment. If we so decide, we then must ask whether the Rector and Visitors are imposing an unconstitutional condition upon the exercise of the plaintiffs' protected speech; that is, we must determine whether the Rector and Visitors are demanding that the members of Wide Awake Productions cease publishing religious speech in *Wide Awake* before they may become eligible [26] for an award of SAF funds.

1.

With respect to the first part of this inquiry, we easily conclude that the plaintiffs' publication of religious speech in *Wide Awake* falls within the protective ambit of the

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[26] The parties wrangle at considerable length over the question whether Wide Awake Productions ever was "eligible" for SAF funding at all. The plaintiffs contend that attainment of CIO status by Wide Awake Productions made the organization "eligible" to receive SAF monies. The Rector and Visitors argue that Wide Awake Productions never was "eligible" for funding because its central purpose—publication of *Wide Awake*—constituted a "religious activity." We need not address the merits of these opposing positions, because we reject forthwith the Rector and Visitors' suggestion that they be given unlimited discretion to determine the "eligibility" of student groups for SAF funding to the extent such discretion derogates the provisions of the Bill of Rights. The duty of upholding (and therefore of not wounding indirectly) the Federal Constitution devolves upon the Rector and Visitors as a matter of law; as agents of the Commonwealth of Virginia, the Rector and Visitors are bound to observe the strictures of the First Amendment, and may not issue regulations transgressing its bounds. As we note elsewhere herein, once SAF funds are made available to student groups at the University, they must be distributed in a viewpoint-neutral manner, absent the showing of a compelling state interest.

Speech and Press Clause. There is no question that discussions of religion are, as they long have been, a form of speech protected by the First Amendment. *See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563-2564, 69 L.Ed.2d 298 (1981); *Saia v. New York*, 334 U.S. 558, 561-62, 68 S.Ct. 1148, 1150-51, 92 L.Ed. 1574 (1948). Although the Rector and Visitors' prohibition of SAF funding for "religious activities" is not directed exclusively at religious *speech*, the phrase "religious activit[y]" as defined in the guidelines necessarily encompasses speech that "primarily promotes or manifests a particular belief[] in or about a deity or an ultimate reality." The word "activity" is defined as "an occupation, pursuit, or recreation in which a person is active," *Webster's Third New International Dictionary* 22 (1976).

There can be no doubt that the publication of a journal of religious expression is precisely such an occupation, pursuit, or recreation.

2.

Having answered the first prong of the inquiry affirmatively, we address the second prong: Have the Rector and Visitors effectively demanded that the members of Wide Awake Productions cease publishing religious commentary in Wide Awake before they may become "eligible" for an award of SAF funds? We conclude that they have.

The guidelines lay upon the Student Council an affirmative obligation not to fund religious activit[ies]." This obligation means that religious expression, such as that in *Wide Awake*, is never allowed to compete for funds with other forms of speech that might be indulged by University students. Even if a student organization achieves CIO status, to the extent that its pursuits and functions consist of religious speech, the organization's funding requests

will be summarily rejected by the Student Council. In effect, then, the Rector and Visitors' restriction has operated to erect a prior restraint on University subsidization of all forms of religious expression in which a CIO might engage. While we acknowledge that a CIO has no right to funding by the Rector and Visitors, *see, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, —— U.S. ——, ——, 113 S.Ct. 2141, 2146, 124 L.Ed.2d 352 (1993), when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity. *See Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2370-71, 110 L.Ed.2d 191 (1990) (plurality opinion); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382, 105 S.Ct. 3216, 3221-22, 87 L.Ed.2d 267 (1985); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344-45, 49 L.Ed.2d 179 (1976) (plurality opinion); *Everson v. Board of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947). Although government need not subsidize exercise of a constitutional right, the lack of an affirmative duty of financial support does not mean that government may, in general, penalize exercise of constitutional rights by withholding from their possessors an otherwise discretionary benefit.

We conclude that the Rector and Visitors' erection of a prior restraint against University funding of such "religious activities" as the publication of religious expression in *Wide Awake* constitutes precisely such a penalty, because it restrains Wide Awake Productions from gaining access altogether to a funding source generally available to CIOs not engaged in religious expression.[27] This prior restraint ultimately forces the members

[27] We do not address the guidelines' prohibition of SAF funding for such organizations as fraternities and sororities or for such activities as social entertainment or philanthropic contributions. Those excluded categories are not at issue in the instant case. *See supra* note 2 and accompanying text.

of Wide Awake Productions—unlike their non-sectarian CIO colleagues—to seek financial sustenance for their speech from coffers outside the University. The Rector and Visitors' funding proscription thus creates an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression.

We hold, therefore, that the Rector and Visitors have conditioned the plaintiffs' receipt of government benefits upon their foregoing constitutionally protected religious expression.

D

In reaching and forbidding funding for speech that meets the definition of "religious activity," but not for speech of other types, the SAF guidelines discriminate among speech on the basis of its content. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229-30, 107 S.Ct. 1722, 1727-28, 95 L.Ed.2d 209 (1987). In order to justify differential treatment of funding eligibility based on the content of the speech involved, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 231, 107 S.Ct. at 1729; *see also Widmar v. Vincent,* 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981); *Carey v. Brown,* 447 U.S. 455, 461, 464-65, 100 S.Ct. 2286, 2990, 2292-93, 65 L.Ed.2d 263 (1980); *Healy v. James,* 408 U.S. 169, 184, 92 S.Ct. 2338, 2347-48, 33 L.Ed.2d 266 (1972). It is to this inquiry that we now turn.

In defense of the guidelines' prohibition, the Rector and Visitors claim a compelling interest in maintaining strict separation of church and state.[28] They derive this

[28] In defense of their position, the Rector and Visitors cite a number of recent decisions by the Supreme Court; without exception, none of these cases are relevant to the question before us, and we find it unnecessary to discuss them at length. For thoroughness' sake, however, we observe that *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), on which the Rector and Visitors lay great emphasis, did not involve the erection of a prior restraint on abortion counseling by recipents of family planning funds under Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 330a-6a. In *Rust,* regulations issued by the Secretary of Health and Human Services simply limited the ability of Title X fund recipients to engage in abortion-related expressive activities. *Id.* at ——, 111 S.Ct. at 1764. Although, like the SAF funding restrictions at issue here, the regulations broadly prohibited Title X projects from engaging in activities that "encourage[d], promote[d] or advocate[d] abortion as a method of family planning," *id.* at ——, 111 S.Ct. at 1765, there was no question that the recipients were *recipients*—that is, that they already had received Title X funding. In his opinion for the Court, Chief Justice Rehnquist emphasized this distinction:

> Petitioners' reliance on [the Court's "unconstitutional conditions" cases] is unavailing . . . because here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.

Id. at ——, 111 S.Ct. at 1774. Thus, the issue in *Rust* was not—as here—whether the recipients could obtain access to government benefits. It was, instead, whether the government could be allowed to dictate the use to which already-allocated funds could be dedicaated.

interest from the Establishment Clause of the First Amendment, which admonishes Congress (and, through application of the Fourteenth Amendment, the states[29]) to "make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. The Rector and Visitors argue that they cannot fund "religious activities" without violating the Establishment Clause.

We agree with the Rector and Visitors that their interest as state officials in complying with federal constitutional obligations, including avoiding the creation of an "establishment" of religion at the University of Virginia, may be characterized as compelling. *See Widmar,* 454

[29] *E.g., Everson v. Board of Educ.,* 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-512, 91 L.Ed. 711 (1947).

U.S. at 271, 102 S.Ct. at 275. It does not follow, however, that offering Wide Awake Productions an equal opportunity to compete for SAF funds necessarily would be incompatible with the Establishment Clause. *Id.*

That government largesse ultimately should redound to the benefit of persons engaged in promoting religion does not necessarily entail violation of the Establishment Clause. If such were the case, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Id.* at 274-75, 102 S.Ct. at 277. Moreover, such an extreme position is plainly contrary to many of the Supreme Court's decisions upholding government aid to parochial elementary and secondary schools. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, —— U.S. ——, ——-——, 113 S.Ct. 2462, 2466-67, 125 L.Ed.2d 1 (1993) (summarizing the Court's Establishment Clause jurisprudence with respect to government aid to parochial schools).

To test the Rector and Visitors' Establishment Clause justification for the guidelines' funding policy, then, we must consider whether awarding SAF monies to the members of Wide Awake Productions to defray the publication costs of *Wide Awake* would constitute an "establishment of religion" at the University of Virginia. In making this determination, we seek enlightenment in the Supreme Court's Establishment Clause jurisprudence. That jurisprudence holds that a governmental policy will not offend the Establishment Clause if it can pass constitutional muster under the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which guides "[t]he general nature of our inquiry in this area," *Mueller v. Allen*, 463 U.S. 388, 394, 103 S.Ct. 3062, 3066, 77 L.Ed.2d 721 (1983):

> First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits

> religion . . .; finally, the [policy] must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111-12.[30]

In the paragraphs that follow, we consider the Rector and Visitors' Establishment Clause justification for pro-

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[30] As we are well-aware, the Supreme Court's applications of *Lemon* have been characterized by fine distinctions, and have aroused considerable controversy among the Justices themselves, even to the point of frequent suggestion in non-majority opinions that *Lemon* be abandoned. We note, for example, Justice Scalia's recent denunciation of *Lemon:*

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children . . . .

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., —— U.S. ——, ——-——, 113 S.Ct. 2141, 2149-50, 124 L.Ed.2d 352 (Scalia, J., dissenting, joined by Kennedy, J.); *see also, e.g., Wallace v. Jaffree*, 472 U.S. 38, 68-69, 105 S.Ct. 2479, 2495-2497, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring in judgment) (arguing that "the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment"); *id.* at 91, 105 S.Ct. at 2508 (White, J., dissenting) (urging "basic reconsideration of our precedents" surrounding the Establishment Clause); *id.* at 110, 105 S.Ct. at 2517 (Rehnquist, J., dissenting) (stating that the "*Lemon* test has no . . . grounding in the history of the First Amendment" and "has simply not provided adequate standards for deciding Establishment Clause cases").

Nevertheless, "*Lemon*, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, —— U.S. at —— n. 7, 113 S.Ct. at 2148 n. 7. We are bound to follow the decisions of the Supreme Court, not the pronouncements of a single Justice or even of a pair of Justices in dissent. As Justice Powell has stated,

> the three-pronged *Lemon* test . . . is the only coherent [Establishment Clause] test a majority of the Court has ever adopted. . . . *Lemon* has never been overruled or its test modified.

Jaffree, 472 U.S. at 64, 105 S.Ct. at 2494 (Powell, J., concurring) (footnote and citations omitted). For purposes of the Establishment Clause question presented here, therefore, we are bound to consider *Lemon* governing precedent.

hibiting SAF funding of "religious activities" in light of *Lemon*.[31]

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[31] We reject the plaintiffs' contention that the Supreme Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (plurality opinion), controls our analysis of the Establishment Clause issue presented by this case, and, obviates the need to examine the guidelines' restrictions in light of *Lemon v. Kurtzman*. *Texas Monthly* involved a state sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings sacred to a religious faith." *Texas Monthly*, 489 U.S. at 5, 109 S.Ct. at 894. The Court held that the exemption was insufficiently broad—that is, that it did not reach an adequately wide class of publications—to pass Establishment Clause scrutiny.

If *Texas Monthly* has application in the instant case, it is only as an extra pillar for our initial, but not dispositive, holding that the SAF guidelines' "religious activit[y]" prohibition has erected a presumptively unconstitutional prior restraint on the receipt of a government benefit. In his opinion for a three-Justice plurality, Justice Brennan stated:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to free exercise of religion . . ., it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community. This is particularly clear where, as here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths.

Id. at 15, 109 S.Ct. at 899 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348, 107 S.Ct. 2862, 2874-75, 97 L.Ed.2d 273 (1987) (O'Connor, J., concurring in judgment)). As we explain below, an award of SAF funds to defray publication costs of *Wide Awake* would "convey a message of endorsement" of Christianity to non-Christian members of the University of Virginia community. "This is particularly clear," *id.*, because, as we observe such a subsidy would be targeted at a publication whose purpose is "to encourage students to consider what a personal relationship with Jesus Christ means," *Wide Awake*, Nov.-Dec. 1990, at 2—a goal plainly contemplating the "promulgat[ion]" of Christion teachings.

That *Texas Monthly* supports one wing of our analysis does not, however, release us from the obligation of testing the Rector and

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Lemon's first prong focuses on the "purpose that animated" the Rector and Visitors' adoption of the SAF funding guidelines, *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987), and asks whether that purpose was secular.

The obvious point of departure for analyzing the purpose of the guidelines is the Rector and Visitors' comments at the time of their adoption. Although the guidelines are the result of largely undocumented deliberations by the Rector and Visitors, and thus cannot be said to possess a "legislative history" as that term usually is understood, they do contain a "Student Activity Fee Statement of Purpose" relevant to our deliberations. This statement reads:

> The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia. As a required student fee, the monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purpose of the University as well as with state and federal law.

The funding guidelines themselves, which immediately follow the "Student Activity Fee Statement of Purpose" and are part of the same document, were adopted by the Rector and Visitors in an attempt to give practical effect to the SAF's goal of providing financial support for stu-

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Visitors' asserted state interest in complying with the Establishment Clause. Indeed, Justice Brennan's opinion addressed Texas's Establishment Clause defense of its sales tax exemption by holding that the exemption lacked sufficient breadth to pass scrutiny under *Lemon*. *See Texas Monthly*, 489 U.S. at 8-17, 109 S.Ct. at 895-901. Because this case involves a direct governmental subsidy of religious expression rather than a mere exemption from the payment of duties, it is not directly on point with *Texas Monthly*.

dent organizations related to the University's educational purpose. In the third section of the guidelines, titled "Student Expenditures and Activities Not Eligible for Funding," the Rector and Visitors proscribed funding of "religious activities" on the ground that such activities "do not relate to the educational purpose of the University."

These statements make clear that the Rector and Visitors' aim in denying SAF funding to "religious activities" was to comply with the University of Virginia's educational function—a facially secular legislative purpose.[32] Because religion is taught and studied as a subject of formal academic inquiry at the University, however, the plaintiffs contend that religious expression forms part of the institution's educational "purpose." They argue, therefore, that the University, already having admitted religious discussion formally into the academic curriculum, can have no stake in depriving such discussion of access to its coffers, even if the source of the discussion is a student organization.

We disagree. That religion is studied at the University does not mean that offering SAF funding to *Wide Awake* would promote the essentially secular "educational purpose" of the institution, or that such funding necessarily would not threaten the Establishment Clause. Since its founding by Thomas Jefferson in the second decade of the nineteenth century, the University's educational purpose has included teaching and scholarship on a wide array of subjects,[33] including the organized study of religious systems. As the plaintiffs note, while serving as Rector of the University Jefferson explained that no professorship of divinity had been established "in conformity with the principles of [the] constitution, which place all sects of religion on an equal footing," but that arrangements would be made to allow various denominations to establish schools "on the confines of the University" and to allow them access to University facilities. 19 *The Writings of Thomas Jefferson* 408 (A. Bergh ed., 1905) (report to University Visitors dated Oct. 7, 1822). That such "schools" were incorporated into the University's intellectual and academic life does not prevent the Rector and Visitors from employing funding restrictions to advance the "secular purpose" of avoiding an establishment of religion at the institution.

[32] *Cf., e.g., Bowen v. Kendrick*, 487 U.S. 589, 602-04, 108 S.Ct. 2562, 2570-72, 101 L.Ed.2d 520 (1988) (looking to "the face" of the Adolescent Family Life Act to determine whether federal grants in the area of premarital adolescent sexual relations and pregnancy authorized by the Act violate the Establishment Clause).

[33] The Code of Virginia sets forth the "branches of learning to be taught" at the University as follows:

> [T]he Latin, Greek, Hebrew, French, Spanish, Italian, German, and Anglo-Saxon languages; the different branches of mathematics, pure and physical; natural philosophy, chemistry, mineralogy, including geology; the principles of agriculture; botany, anatomy, surgery and medicine; zoology, history and ideology, general grammar, ethics, rhetoric, and belles lettres; civil government, political economy, the law of nature and of nations and municipal law.

Va.Code Ann. § 23-63 (1985 & Supp.1992).

As we see it, it is clear from the SAF's statement of purpose that the funding guidelines were motivated primarily, if not entirely, by a legitimate secular purpose—the advancement of the University of Virginia's educational mission. We do not question the propriety of, nor the secular motivation for, the Rector and Visitors' interest in preserving University funds for the institution's educational mission. The Rector and Visitors do not dispute that, on the whole, religious concerns were not the sole motivation behind the guidelines. *See Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984). The record gives us no reason to doubt that the Rector and Visitors' expressed purposes are "sincere and not a sham." *Id.* at 687, 104 S.Ct. at 1366. Therefore, we hold that the guidelines' proscription against funding of "religious activit[ies]" is not mo-

tivated wholly by an impermissible purpose, and does not offend the Establishment Clause.

2.

As is usual in Establishment Clause cases, *see, e.g., Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 383-98, 105 S.Ct. 3216, 3222-30, 87 L.Ed.2d 267 (1985), the more subtle question is whether the primary effect of the guidelines restrictions is to inhibit or advance religion. *See Lemon,* 403 U.S. at 613, 91 S.Ct. at 2111.

Although we concluded above that the prohibition against funding "religious activities" denies religious *speech* the same access to the SAF accorded secular speech, and thus violates the Speech and Press Clause, whether "religion" is thereby inhibited or advanced is a different matter. The Rector and Visitors have not attempted to ban the publication of *Wide Awake*; indeed, they have supported its religious mission by allowing the members of Wide Awake Productions access to University meeting and printing facilities equal to that afforded all other CIOs. The University permits the plaintiffs to distribute *Wide Awake* on its grounds without limitation.

Notwithstanding its refusal to subsidize the journal directly, the University's sustenance of religion in these incidental respects does not, in our view, inhibit religion. The University's policy of allowing the members of Wide Awake Productions open access to campus facilities accords the plaintiffs ample opportunity to express their religious views, and leaves the University community as a whole free to read and consider them. The Rector and Visitors' funding policy simply declines to take the additional step of actively subscribing University funds to *Wide Awake*'s particular religious perspective. Under such circumstances as these, we are unpersuaded that the primary effect of the guidelines restrictions, involving as they do only the direct allocation of public monies, would be to inhibit religion.

On the other hand, it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief. As the Constitution of Wide Awake Productions attests, *Wide Awake* strives to challenge Christians to live according to the faith they espouse, and to encourage students at the University to consider "what a personal relationship with Jesus Christ means." *Wide Awake,* Nov.-Dec. 1990, at 2. The journal's contents—some of which are aimed at proselytizing non-Christians—have pursued these goals indefatigably throughout the three issues of *Wide Awake* represented in the record. Using public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation. In the words of Justice Powell:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a *specifically religious activity* in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973) (emphasis added). Here, then, we hold that the primary effect of an SAF subsidy of *Wide Awake*'s publication costs would be to advance religion.

3.

It is the third of the three *Lemon* criteria—whether the guidelines' prohibition of funding for "religious activities" fosters an excessive government entanglement with religion—that is most plainly implicated by this case. *Lemon,* 403 U.S. at 613, 91 S.Ct. at 2111. The constitutional prohibition against excessive church-state entanglement reflects James Madison's concern that secular and religious authorities must not interfere with each

other's respective spheres of choice and influence. *See* III Jonathan Elliott, *Debates on the Federal Constitution* 431-32, 729-31 (1891) (remarks of James Madison); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 465-66, 92 L.Ed. 649 (1948).[34] The entanglement principle thus stems ultimately from fears, originally propounded by the First Amendment's principal framer, that church-state entanglement might strain the political system, compromise liberty of conscience, and, ultimately, "destroy government and downgrade religion." *Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1961); Laurence H. Tribe, *American Constitutional Law* § 14-11, at 1226 (2d ed. 1988) (summarizing the import of church-state entanglement).

The indirect and incidental conferral of a government benefit to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state policy. *Zobrest v. Catalina Foothills Sch. Dist.*, —— U.S. ——, ——-——, 113 S.Ct. 2462, 2466-69, 125 L.Ed.2d 1 (1993); *Widmar v. Vincent*, 454 U.S. 263, 274-75, 102 S.Ct. 269, 276-77, 70 L.Ed.2d 440 (1981); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775, 93 S.Ct. 2955, 2966, 37 L.Ed. 2d 948 (1973). Indeed, the Supreme Court has sanctioned awards of direct non-monetary benefits to religious groups where government has created open fora to which all similarly situated organizations are invited. In *Widmar*, for example, the Court held that a state university which makes its facilities available to registered student groups may not deny equal access to a registered student group desiring to use those facilities for religious worship

[34] *But see Wallace v. Jaffree*, 472 U.S. 38, 98-99, 105 S.Ct. 2479, 2511-2512, 86 L.Ed.2d 29 (1985) (Rehnquist, J., dissenting) (urging that Madison did not attempt to translate Jefferson's Virginia Statute for Religious Freedom into the religion clauses of the First Amendment, and criticizing earlier Supreme Court decisions for adopting this view).

or discussion. 454 U.S. at 277, 102 S.Ct. at 278. Thus, although religious groups may directly benefit from access to university *facilities*, a state university may not discriminate against them based on the content of their speech.

Direct monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color. A proper respect for the Establishment Clause compels the Rector and Visitors to pursue a course of "neutrality" toward religion. Yet providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake*'s Christian mission: "to encourage students to consider what a personal relationship with Jesus Christ means." *Wide Awake*, Nov.-Dec. 1990, at 2. The potentially divisive political effect of such funding is a factor of recurring significance in the Supreme Court's jurisprudence surrounding *Lemon*'s "excessive entanglement" prong. As Justice Black emphasized in *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), competition among religious sects for political and religious supremacy has occasioned considerable civil strife throughout history, "generated in large part" by competing efforts to gain or maintain the support of government. *Id.* at 8-9, 67 S.Ct. at 507-509. As we see it, the "potential for political divisiveness related to religious belief and practice" would be aggravated if the University were to fund the publication of *Wide Awake*. The possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the University of Virginia. The prospect of such divisiveness, as Justice Powell has admonished, is a "warning signal" the Rector and Visitors would ignore at their, and the University's, peril. *Nyquist*, 413 U.S. at 798, 93 S.Ct. at 2978.

Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the Univer-

sity to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values. Since offering SAF funds to the members of Wide Awake Productions would excessively entangle the University of Virginia with the propagation of the Christian religion, we hold that the Rector and Visitors have proved the existence of a compelling state interest in complying with the Establishment Clause. This compelling interest justifies the Rector and Visitors' decision to promulgate guidelines excluding the membership of Wide Awake Productions from access to SAF monies.

E

It remains for us to consider whether the funding guidelines' proscription against "religious activities" is sufficiently circumscribed to survive the strictest judicial scrutiny.

The Supreme Court has held that a government policy is "narrowly tailored" if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988). If the guidelines' "religious activities" proscription had a substantial deleterious effect on the ability of student organizations to engage in meaningful religious expression, the plaintiffs' contention that the proscription is not narrowly tailored might carry considerable force. Yet it is difficult for us to conceive how the Rector and Visitors may avoid offending the Establishment Clause without extending the prohibition on SAF funding to all "religious activities." Because the First Amendment forbids government to promulgate policies "respecting an establishment of religion," government is left no choice but to foreswear financial support of the myriad forms of religious endeavor in which a student organization might engage. Hence, we believe that the guidelines' declaration that student organizations involved in "religious activities" as that

phrase is defined [35] is not "substantially broader than necessary" to achieve the Rector and Visitors' legitimate constitutional ends, *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984), and thus satisfies the requirement of narrow tailoring.

F

In summary, we conclude that the Rector and Visitors' refusal to permit funding of "religious activities" places a presumptively unconstitutional condition upon access to government benefits in violation of the Free Speech and Press Clause of the First Amendment. We further conclude, however, that the Rector and Visitors have shown the existence of a compelling state interest in (1) foregoing funding awards that would have the primary effect of advancing religion at the University of Virginia, and (2) preserving the University of Virginia from an excessive entanglement with religion. Finally, the Rector and Visitors' restriction against funding "religious activities" is narrowly tailored to achieve this compelling state interest. Having survived the strictest judicial scrutiny, the funding restriction cannot be labelled constitutionally invalid under the Speech and Press Clause.

IV

The district court rejected the plaintiffs' contention that the guidelines' proscription of funding for "religious activities" violates the Free Speech and Press Clause by excluding them from the "limited public forum" represented by the SAF. After careful and reasoned consideration of the governing precedents, *see Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 3446, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983), the court concluded that the Rector and Visitors' systematic, pur-

[35] *See supra* note 2.

poseful exclusion of certain student groups from access to SAF funds indicated that the Rector and Visitors intended the SAF to be a nonpublic forum. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 795 F.Supp. 175, 178-81 (W.D.Va.1992) (mem.)

We agree that the Rector and Visitors have not created a limited public forum by awarding SAF funds only to those student organizations which, in the view of University authorities, advance the institution's essentially secular educational mission although we do so for a different reason. As laid out in part III, *supra,* we believe that the proper analysis of this case lies under the line of authority dealing with content-based discrimination relating to government-generated benefits or burdens. The long line of public forum cases have taken "forum" in a fairly literalistic way involving physical space, and we do not see how it advances the jurisprudence to wrench that word out of its accepted form to encompass this type of case already subject to First Amendment scrutiny.

V

We finally turn to the plaintiffs' contention that the guidelines' prohibition against funding of "religious activities" discriminates against them in contravention of the Equal Protection Clause of the Fourteenth Amendment (1) by denying them benefits which other CIOs engaged in religious speech and activities have received, and (2) because the restrictions serve no compelling state interest, and are not narrowly tailored to satisfy whatever interest the Rector and Visitors may have in denying funding to "religious activit[ies]."

A

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. The plaintiffs contend that the Rector and Visitors have infringed their

rights under the Equal Protection Clause by awarding SAF monies to the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society while denying funding to Wide Awake Productions.

To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect. *See Crawford v. Board of Educ.*, 458 U.S. 527, 544, 102 S.Ct. 3211, 3221, 73 L.Ed.2d 948 (1982); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *Irby v. Virginia State Bd. of Elections,* 889 F.2d 1352, 1355 (4th Cir.1989), *cert. denied,* 496 U.S. 906, 110 S.Ct. 2589, 110 L.Ed.2d 270 (1990). Upon careful review of the summary judgment record, the district court found no evidence to indicate that the University's denial of SAF funding to Wide Awake Productions was the product of discriminatory intent. Because this finding is not contested by the plaintiffs on appeal, we are constrained to hold that the district court's factual findings on the point are not tainted with clear error. Moreover, the plaintiffs' failure to argue the existence of discriminatory intent as a matter of law on appeal deprives us of jurisdiction to consider the merits of their equal protection claim, and compels us to affirm the district court's decision to grant summary judgment in favor of the Rector and Visitors.

B

For the reasons stated in part III, *supra,* we already have held that the Rector and Visitors' refusal to fund "religious activities" serves the compelling state interest of preserving the University of Virginia from an excessive entanglement with religion, and is narrowly tailored to achieve that interest. We therefore need not consider this question again for purposes of the Fourteenth Amendment. The Rector and Visitors' stake in avoiding an ex-

cessive entanglement with religion is equally strong in all constitutional contexts, including that of the Equal Protection Clause, if, as we hold, no prima facie violation of the plaintiffs' equal protection rights exists. This assignment of error therefore warrants no further discussion.

VI

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. VIRGINIA
CHARLOTTESVILLE DIVISION

Civ. A. No. 91-0036-C

RONALD W. ROSENBERGER, as a member of Wide Awake Productions, *et al.*,
Plaintiffs,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Defendants.

May 20, 1992

MEMORANDUM OPINION

MICHAEL, District Judge.

In this case, the court is asked to resolve the difficult question of whether a "student activities fund," comprised of mandatory student fees, constitutes a limited public forum. For the reasons set forth below, the court concludes that the answer to this riddle is "no."

I.

In September of 1990, plaintiff Ronald W. Rosenberger, an undergraduate student at the University of Virginia (the University), joined with other University students to form Wide Awake Productions (WAP). WAP is an unincorporated association officially recognized by

the University as a Contracted Independent Organization (CIO). This recognition is given to all student organizations which execute an annual agreement with the University and meet certain minimal requirements.[1] The benefit of becoming a CIO is that such organizations are given access to University facilities; i.e. meeting rooms, computer terminals, etc.

WAP publishes Wide Awake Magazine (Wide Awake), a non-profit journal written, edited and published by the student members of WAP. Mr. Rosenberger serves as the magazine's publisher, while other named plaintiffs include members of the management and editorial staff. To date, three issues of Wide Awake have been published, with approximately 5,000 copies of each issue distributed free of charge to students on the University campus.

In January of 1991, WAP submitted an application for funding from the University in the amount of $5,862.00 to offset the cost of publishing its magazine. Specifically, WAP sought funding from monies deposited in the University's Student Activities Fund (SAF). The SAF is funded by a mandatory student activities fee collected from every full-time student at the University. The activity fee is designed to provide financial support for student organizations related to the educational purposes of the University.

The defendants in this action, the Rector and Board of Visitors of the University (the Board)[2] have ultimate

[1] There are four general criteria for CIO status: (1) at least fifty-one percent of the group's members must be students; (2) the group's officers must all be full-time, fee-paying students; (3) the group must keep an updated copy of its constitution on file with the University; and (4) the group must sign an anti-discrimination disclaimer.

[2] The individual Board members and Mr. Robert Stump, Associate Dean of Students, are named defendants and are being sued in their official capacities.

responsibility for the operation of the SAF. The Board has delegated the responsibility of allocating SAF funds to the University's Student Council. The Student Council disburses SAF funds to those CIOs deemed eligible for funding as determined by Guidelines issued by the Board. These Guidelines prohibit several categories of student organizations from obtaining SAF funds. Ineligible groups include fraternities and sororities, political and religious organizations, and those groups whose membership is exclusionary in nature. Further, the following expenditures and activities are also excluded by the Guidelines: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment or related expenses; (4) philanthropic contributions and activities; and (5) political activities.

A CIO seeking SAF monies must first submit a request for funding to the Student Council Appropriations Committee, a subcommittee of the full Student Council, As noted earlier, WAP made its first and only request for funding in January of 1991. The Chairman of the Student Council denied the funding request because the Appropriations Committee determined that publication of Wide Awake constituted a "religious activity."[3] WAP appealed this decision to the full Student Council, which affirmed the Appropriation Committee's denial of funding. WAP pursued all internal means of appeal before filing suit in this court on July 11, 1991. The plaintiffs allege that the denial of SAF benefits violates their rights to freedom of speech, freedom of press, freedom of association, free exercise of religion, and equal protection of the laws in violation of the United States Constitution, the

[3] Mr. Rosenberger admits that Wide Awake is written from a "religious perspective." Further, Article 1 of WAP's constitution states that the purpose of the organization is to: (1) publish a magazine of philosophical and religious expressions; (2) facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints; and (3) provide a unifying focus for Christians of multicultural backgrounds.

Virginia Constitution, and the Virginia Act for Religious Freedom. Plaintiffs have also set forth a cause of action pursuant to 42 U.S.C. Section 1983.

On November 12, 1991, the plaintiffs filed a motion for summary judgment, asking this court for a declaratory judgment that the defendants had indeed violated the plaintiff's [sic] constitutional rights. The defendants filed a cross motion for summary judgment and both sides appeared before this court for oral argument on these motions. Both sides agree, with minor exceptions addressed herein, that there are no genuine issues of material fact in conflict. Thus, this matter is ripe for disposition.[4]

II. The Freedom of Speech Claims

The preliminary question for this court to resolve is whether the University's SAF qualifies as a "limited public forum" as the plaintiffs assert, or whether the SAF is in fact a "non-public" forum, as the defendants argue. This determination is crucial as it dictates the degree of scrutiny to be used by this court in reviewing the Board of Visitor Guidelines.[5] *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.")

[4] The defendants have filed a motion to dismiss the plaintiffs' claim for damages under 42 U.S.C. § 1983 on the grounds that such a claim is precluded by the Eleventh Amendment to the United States Constitution. The court need not address this issue as it has determined that all of the plaintiffs' claims must fail, as a matter of law.

[5] The plaintiffs have launched a general assault on the propriety of certain exclusion in the Guidelines; i.e. those prohibiting the funding of religious organizations and activities. Alternatively, the plaintiffs set forth an equal protection claim by arguing that the Guidelines have not been applied in an even-handed manner. The court will address the equal protection issue in part IV of this opinion.

See also Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 797, 105 S.Ct. 3439, 3446, 87 L.Ed.2d 567 (1985) ("the extent to which the Government may limit access [to a forum] depends on whether the forum is public or nonpublic.")

The phrase "limited public forum" describes one of three categories of fora identified by the Supreme Court in *Perry, supra.*[6] A limited public forum is property "which the State has opened for use by the public even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45, 103 S.Ct. at 955 *citing Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). A state may only restrict access to limited public fora if such a restriction is narrowly drawn to effectuate a compelling state interest. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. A different category of property consists of public property which is not "by tradition or designation a forum for public communication." *Id.* Not surprisingly, this type of property is labeled "nonpublic." Access to such a forum can be limited by restrictions which are " 'reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's view.' " *Cornelius*, 473 U.S. at 800, 105 S.Ct. at 3448 quoting *Perry*, 460 U.S. at 46, 103 S.Ct. at 955.

It should be apparent from the preceding discussion that the label affixed to the University's SAF (either limited public forum or nonpublic forum) will have a rather profound impact on whether the Board's Guidelines will be upheld by this court. The plaintiffs rely heavily on *Gay and Lesbian Students Assn. v. Gohn*, 850 F.2d 361 (8th Cir.1988) for the proposition that "compulsory student activities fees" constitute a limited public forum. In *Gohn*, the Gay and Lesbian Students Association (GLSA) at the University of Arkansas at Fayetteville challenged the decision of the Student Senate denying

[6] The plaintiffs do not argue that the SAF is a traditional public forum.

funding to the group. The money was to be paid out of funds from "tuition, state tax money, and general fees collected from students." *Id.* at 361. In finding that the denial of funding violated GLSA's First Amendment rights, the court stated:

> we hold that a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed.

Id. at 362.

This court does not read *Gohn* at holding that a student activities fund is a limited public forum. *Gohn* merely stands for the proposition that "content-based discrimination can be justified only if the government demonstrates that its regulation is narrowly drawn and is necessary to effectuate compelling state interests." *Id.* at 367 citing *Widmar*, 454 U.S. at 270, 102 S.Ct. at 274. The plaintiffs read this citation to *Widmar* and the mention of a "compelling state interest" as a signal that the Eighth Circuit considered the student activity fee as creating a limited public forum, thus requiring the use of a heightened level of scrutiny. This reading of *Gohn* stretches the Eighth Circuit's opinion beyond the breaking point.

The mere mention of heightened scrutiny does not in and of itself indicate that the court is dealing with either a traditional or a limited public forum. Heightened scrutiny can also be applied even if the forum is characterized as nonpublic. The Supreme Court recognized this in *Perry* by stating:

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.' In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view.

460 U.S. at 46, 103 S.Ct. at 955 (citations omitted).

This passage from *Perry* indicates that viewpoint discrimination will *rarely* be tolerated, regardless of whether the restriction applies to public, limited or nonpublic fora. Further, a careful reading of *Gohn* indicates that the Eighth Circuit considered the student service funds as creating a nonpublic forum. Specifically, the court noted that:

> We realize that the District Court made no explicit finding as to the reason for denial of funding, that this is a question of fact, and that appellate courts are not fact-finding forums. We think, though, that the District Court's opinion, when read in full and in context, includes an implicit finding that funds were denied because of distaste for the GLSA's ideas. Otherwise, there would have been no need to resort to the legal doctrines (e.g. that there is no "right" to public money) used by the Court to justify dismissing the complaint. *A finding of fact that funds were denied for some content-neutral reason would have sufficed completely to dispose of the case.* In any event, the facts of this case are so obvious that a remand for an explicit finding would be a waste of time. This record leaves no reasonable doubt that funds were denied because of disagreement with GLSA's speech. (emphasis added).

Gohn, 850 F.2d at 367. Here, the court indicates that GLSA would have lost its case had the University of Arkansas put forth a content neutral reason for denying

funding. This is not the standard used in limited public forum cases, but instead is the standard used in non-public forum situations.

This court also looks to *Cornelius, supra* for guidance as to whether the SAF qualifies as a public forum. Here, the Supreme Court began its forum analysis by noting that, "[t]he government does not create a public forum by inaction *or by permitting limited discourse,* but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449 citing *Perry,* 460 U.S. at 46, 103 S.Ct. at 955. (emphasis added). In *Cornelius*, the Supreme Could held that the Federal Government could exclude legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC), a charity drive directed at federal employees. The Court held that the campaign was a nonpublic forum because:

> [t]he Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials . . . The Civil Service Commission and, after 1978, the Office of Personnel Management developed extensive criteria to limit access to the Campaign to those organization considered appropriate. Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.

Cornelius, 473 U.S. at 804-5, 105 S.Ct. at 3450 (citations omitted).

In the present situation, the University has limited eligibility for SAF monies to those organizations deemed "appropriate." Religious organizations are but one of several groups excluded from participation in the SAF because the Board of Visitors has decided that such groups do not further the educational purposes of the University. This exclusion of religious groups and religious activities has been in effect since the establish-

ment of the Guidelines in 1970, and has survived revisions in 1973, 1978, 1980 and 1991.

The plaintiffs attempt to counter this fact by arguing that "the defendants created the SAF mechanism to encourage the exchange of opinions and viewpoints among students at the University of Virginia in furtherance of the educational mission of the University." In support of this assertion, the plaintiffs direct the court to the page 1 of the Guidelines. The Guidelines, in pertinent part, read as follows:

> STATEMENT OF PURPOSE
>
> The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia. As a required student fee, the monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purpose of the University as well as with state and federal law.

This court does not read this passage to indicate a desire on the part of the Board of Visitors to "encourage the exchange of opinions and viewpionts." Rather, the Guidelines suggest that the SAF was established to fund only those CIOs whose activities contributed to the educational focus of the University. The Board of Visitors has not opened the SAF coffers to all CIOs;[7] some groups, such as WAP, were excluded simply because the Board of Visitors determined that their activities were not consistent with the goals of the University. The consistent, purposeful exclusion of certain groups indicates that the SAF is indeed a nonpublic forum.

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[7] For the academic year 1990-91, 343 student organizations qualified as CIOs. Of these 135 applied for SAF funds and 118 were actually allotted SAF monies.

This conclusion is further supported by the Supreme Court's reasoning in *Perry, supra.* The forum in *Perry* consisted of an interschool mailing system used to facilitate communication between various teachers. A teacher's union challenged the local Board of Education's decision denying the union access to the system. The plaintiff union argued that the school mail facilities became a limited public forum because other private, non-school-connected groups had previously been given access to the system. *Perry*, 460 U.S. at 47, 103 S.Ct. at 956. In rejecting this contention, the Court stated:

> The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum.

Id.

Similarly, the fact that the University has given certain CIOs access to SAF funds does not lead to the conclusion that such selective access transforms the SAF into a limited public forum.

Finally, the plaintiffs [sic] reliance on *Widmar* is misplaced. The present case might very well be resolved in plaintiffs [sic] favor if the University had denied CIO status to WAP. The defendants themselves take the position that access to certification as a CIO is a limited public forum. This is because only CIO's have access to University facilities.[8] This is a far cry from the present situation and is the reason why this court finds *Widmar* factually distinguishable from the case at hand.

Having concluded that the SAF is a nonpublic forum, this court must now determine whether the Board's Guidelines constitute restrictions which are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker' [sic] views." *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. The defendants offer two basic rationales for excluding religious organizations such as WAP from SAF eligibility. First, the University has only limited funds to disburse and must therefore limit funding to those activities which it determines advance its educational mission. Second, the ineligibility of religious organizations and activities is justified based on the Federal and State constitutional mandate of state neutrality toward religion.

Although fiscal restraints are pertinent, this court may resolve the reasonableness of the Guidelines by reference to the University's second proffered reason. The parties devote considerable time in their respective briefs addressing the obvious Establishment Clause issues raised

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[8] The plaintiffs allege that they have been denied access to certain University facilities yet have presented no evidence, beyond Mr. Rosenberger's affidavit, to [sic] support of this claim. For instance, there is no assertion that WAP has even attempted to use University facilities or computers. The defendants have submitted the affidavit of Mr. Stump, who swears that "[a]s a CIO, Wide Awake has been and is accorded the same access and use of University facilities as other CIOs." The court has considered this conflicting evidence in the light most favorable to the plaintiffs, but comes to the conclusion that WAP has not raised a genuine issue of material fact as to this issue.

in this case. However, this court need not resolve this issue on the facts of this case. For even if the plaintiffs were correct in their assertion that funding Wide Awake would not violate Federal or State law, it is not the province of this court to second guess the legal judgments made by the University. So long as the University's Establishment Clause fears are reasonable, the Guideline restriction must stand. Given the complexity of the law in this regard, this court has little trouble in finding that the Guideline restriction is a reasonable limit to access to SAF funds. Further, the restriction is a reasonable response by the University to prevent excessive entanglement with religion.

The court also finds that the Guideline limitations do not result in viewpoint discrimination against religious organizations such as WAP. The plaintiffs seem to argue that any across the board restriction applied to a religious group results in content based discrimination. This may be true in the abstract, but this court, and the University, must live in the real world. It could be argued that every decision by the University results in viewpoint discrimination. On this point, the court finds Justice Stevens' comments in his concurring opinion in *Widmar* to be highly relevant. Justice Stevens states that:

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.

Widmar, 454 U.S. at 278, 102 S.Ct. at 278.

In brief, the plaintiffs' complaints about the Guidelines are more properly directed at the wisdom and not the

legality of the restrictions. This is because the court finds, as a matter of law, that the Board's Guidelines are reasonable and do not violate any of the plaintiffs' constitutional rights.[9]

III. The Free Exercise of Religion Claims

The heart of the plaintiffs' claim is that without SAF monies WAP must devote more time to fund raising and less time to publishing its religious speech. Thus, the denial of funding burdens the plaintiffs' free exercise of religion by diverting energy away from WAP's main goal: challenging Christians to live according to their faith.

Both sides agree that this court's analysis should begin with *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.) *cert. denied*, —— U.S. ——, 111 S.Ct. 131, 112 L.Ed.2d 99 (1990). Here, the Fourth Circuit stated that in reviewing a free exercise claim, a court should:

> . . . examine the burden on the exercise of . . . [plaintiff's] sincerely held religious beliefs, then determine whether the state presents a compelling justification for imposing this burden, and finally balancing the burden on free exercise against the state's . . . [compelling interest].

Id. at 1397.

In the present case, it is difficult for this court to identify any burden of constitutional magnitude that has been imposed on the plaintiffs. It is logical to assume that publishing a magazine is easier if someone else pays the bills. However, if this incidental burden was of constitutional significance, the free exercise clause would be implicated in every funding decision involving a religious organization. A review of the record indicates that WAP is un-

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[9] In their briefs and in oral argument, the parties did not separately address plaintiffs' claims under Federal and State law. Although the court has focused on Federal Constitutional law, the preceding analysis applies to the plaintiffs' claims based on the Virginia Constitution and the Virginia Act for Religious Freedom.

able to point to any facts making their burden unique from other CIOs which have been denied SAF monies. Political groups and fraternities and sororities share a common plight with WAP: none of these groups is eligible for funding. The only distinguishing factor is that WAP engages in religious activity. However, WAP has not cited this court to any authority indicating that religious organizations should receive preferential access to a nonpublic forum.

The plaintiffs' attempt to bridge this gap in their argument by asserting that "freedom of expression may not be infringed by denying a privilege." WAP relies on *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963) to support this position. This court does not read *Sherbert* as broadly as do the plaintiffs. In *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 883, 110 S.Ct. 1595, 1602, 108 L.Ed.2d 876 (1990), the Court stated that, "[u]nder the *Sherbert* test, governmental actions that *substantially* burden a religious practice must be justified by a compelling governmental interest." (emphasis added). This language itself indicates that a burden must be substantial before the court will consider whether the state has a compelling reason for the restriction.[10] The Fourth Circuit appears to have adopted this position in *Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir.) *cert. denied* —— U.S. ——, 112 S.Ct. 188, 116 L.Ed.2d 149 (1991). Here the court stated that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substanial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Goodall, 930 F.2d at 369 quoting *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).[11]

Even if this court were to consider the Board's Guidelines as imposing a burden on WAP's free exercise of religion, WAP is still bound by the Fourth Circuit's holding in *Goodall, supra*, that avoidance of a violation of the Establishment Clause constitutes a compelling state interest. *Goodall*, 930 F.2d at 370. Further, balancing the minimal burden on the plaintiffs with the defendants [sic] rationale for the Guidelines indicates that the scale must come down in favor of the defendants.

IV. The Equal Protection Claims

The last issue for the court to resolve in [sic] the plaintiffs' claims that the Guidelines have been applied in less than an even-handed manner. Put somewhat differently, the plaintiffs contend that they have been denied equal protection of the laws because other "religious groups" have been given SAF monies. As evidence of this unequal treatment, WAP focuses on the funding decisions make [sic] with respect to other CIOs.

The defendants seek to counter this argument by citing this court to *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir.1989), *cert. denied* 496 U.S. 906, 110 S.Ct. 2589, 110 L.Ed.2d 270 (1990). *Irby* stands for the proposition that a plaintiff challenging a facially neutral statute with an equal protection claim must show not only disparate effect, but also discriminatory intent. Thus, the defendants do not argue that

[10] The court notes that the plaintiffs have not identified a religious practice which is infringed by the Board's Guidelines. Apparently the plaintiffs contend that publishing a religious magazine is itself a religious practice.

[11] The court also notes that with few exceptions, *Sherbert* has been limited to those cases involving the denial of unemployment compensation benefits. *See Smith, supra*, 494 U.S. at 883, 110 S.Ct. at 1602.

the Student Council's funding decisions are always correct. Instead, the defendants argue that there is no evidence to suggest that the Student Council's decision to deny funding to WAP resulted from discriminatory intent.

In their reply brief, the plaintiffs do not dispute the defendants statement of the law nor the facts of this issue. The court has reviewed the entire record independently, and cannot find any evidence to indicate that the decision to deny funding to WAP was based on discriminatory intent. Accordingly, summary judgment in favor of the defendants is appropriate.

In summary, the court holds that access to the SAF is a nonpublic forum upon which the University has imposed reasonable restrictions. These restrictions do not impose an impermissible burden on the plaintiffs' exercise of their rights as guaranteed by either the Federal or State Constitutions, or the Virginia Act for Religious Freedom. Thus, the court denies the plaintiffs' motion for summary judgment and grants the defendants' cross motion for summary judgment. An appropriate order shall this day issue.

ORDER

For the reasons set forth in the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that:

1. The plaintiffs' motion for summary judgment is denied;

2. The defendants' cross motion for summary judgment is granted.

This case shall be dismissed and stricken from the docket of the court. The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

APPENDIX C

Filed May 23, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1736
CA-91-36-C

RONALD W. ROSENBERGER, as a member of Wide Awake Productions; WIDE AWAKE PRODUCTIONS; WIDE AWAKE MAGAZINE; GREGORY W. MOURAD; ROBERT J. PRINCE,
Plaintiffs-Appellants,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA; EDWARD E. ELSON; W. L. LYONS BROWN, JR.; ROBERT G. BUTCHER, JR.; N. THOMAS CONNALLY; HOVEY S. DABNEY; WALLER H. HORSLEY; J. THOMAS HULVEY; EVANS B. JESSEE; PATRICIA M. KLUGE; ARNOLD H. LEON; LEIGH B. MIDDLEDITCH, JR.; ELIZABETH D. MORIE; FREDDIE W. NICHOLAS, SR.; S. BUFORD SCOTT; JESSE B. WILSON, III; THOMAS E. WORRELL, JR.; ADAM S. ARTHUR; ALEXANDER G. GILLIAM, JR.; RONALD J. STUMP,
Defendants-Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellants filed a petition for rehearing with suggestion for rehearing in banc.

Judge Widener reqeusted a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener, Niemeyer and Luttig voted to rehear the case in banc, and Judges Ervin, Russell, Hall, Phillips, Murnaghan, Wilkins, Hamilton, Williams, Michael and Sprouse voted against rehearing in banc.

Judge Wilkinson disqualified himself and did not vote.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin for the Court.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX D

STUDENT ACTIVITY FEE STATEMENT OF PURPOSE AND FUNDING GUIDELINES

PASSED BY ACTION OF THE BOARD OF VISITORS ON JANUARY 31, 1991

STATEMENT OF PURPOSE:

The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia. As a required student fee, the monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purpose of the University as well as with state and federal law.

STUDENT ACTIVITIES ELIGIBLE FOR FUNDING:

The Rector and Visitors have determined that activities of the student organizations in the following categories relate to the educational purpose of the University and thus are eligible for funding.

1. Special Status Student Organizations charged by the Board of Visitors;
2. co-curricular organizations which are not administered by University departments or units;
3. club sports;
4. student news, information, opinion, entertainment, or academic communications media groups;
5. cultural organizations;
6. fine arts organizations;
7. Madison House;
8. hobby organizations;

9. non-political groups whose predominate purpose is to present speakers on topics of probable general interest to the University;
10. the Student Legal Services; and
11. service organizations.

STUDENT ORGANIZATIONS NOT ELIGIBLE FOR FUNDING:

The Board of Visitors has determined that fraternities, sororities, honor societies, political organizations, religious organizations, and special status student organizations not charged by the Board of Visitors are ineligible for funds from the student activities fees. An organization is also ineligible when admission is exclusionary in nature and not open to all students or if membership is restricted by reason of age, citizenship, color, disability, gender, race, religion, national origin, political affiliation, sexual orientation, or status as a disabled veteran or veteran of the Vietnam era. Notwithstanding these requirements, a student organization may restrict membership based on ability to perform the activities related to the organization's purpose. In determining cases of discrimination, it is not sufficient to look merely to the constitution of an organization but to its actual practices and operations.

STUDENT EXPENDITURES AND ACTIVITIES NOT ELIGIBLE FOR FUNDING:

The Board of Visitors has further determined that the following expenditures and activities do not relate to the educational purpose of the University and thus are not eligible for funding:

1. honoraria or similar fees;
2. religious activities;
3. social entertainment or related expenses;

4. philanthropic contributions and activities;
5. political activities;
6. activities which would jeopardize the University's tax exempt status.

FUND ALLOCATION AND APPEAL PROCEDURES/ PROCESS:

The Student Activities Committee chaired by the designee of the Vice President for Student Affairs is charged with the authority and responsibility for supervision of the student activities fee fund. With respect to distributions from the fund, Student Council is responsible for allocations to eligible student organizations. The ceiling on the aggregate amount allocated to all such organizations shall be the current balance in the student activities fees fund. The allocation process follows procedures established by Student Council which are intended to maximize the use of the funds and are consistent with the above guidelines. The Student Council Appropriations Committee is responsible for following these procedures and making the recommendations to the Student Council Representative Body on the funding requests. In providing student organizations with appropriations deemed needed, the Student Council Appropriations Committee shall be further guided by such criteria as the size of the group, the University wide benefit of the group's activities, and the group's level of financial self-sufficiency. The committee is encouraged but is not required to appropriate all of the available fund balance.

The Appropriations Committee recommended allocation to a student organization may be appealed to the Student Council Representative Body by any student or student organization. The Student Activities Committee is the next and final appeal for any budget reviewed and, in some cases, adjusted by the Student Council Representative Body. In addition, the Student Activities Com-

mittee may examine on its own motion any student organization's allocation request submitted to the Student Council.

After the allocations are finalized, the Student Council Vice President for Student Organizations writes the chair of the Student Activities Committee requesting that the allocations for those funded organizations be released to the Student Activities Business Manager. When the Student Activities Business Manager receives the funds, they are deposited into a demand deposit account. Expenditures from the allocations can be made provided the student organization completes the proper authorization forms with the Student Activities Business Manager. The student organizations receive their allocation on a per semester basis for payment of expenses of activities conducted during the fall and spring semesters only.

Any funded student organization alleged to be in violation of the above guidelines is subject to the suspension or loss of student activity fee funding after notice and an opportunity to be heard by Student Council. The Student Activities Committee is the next and final appeal body.

The Guidelines for Student Activities Fund Allocation apply to all student organization funding requests that are pending on, or are made after, January 31, 1991.

Attachment Definition of Terms

STUDENT ACTIVITY FEE FUNDING GUIDELINES ATTACHMENT DEFINITIONS OF TERMS

These definitions of terms are intended to provide clarification of the student activity fee fund guidelines. In those cases where further clarification is needed, Student Council and, if necessary, the Student Activities Committee will interpret the guidelines based on the facts presented and the Board of Visitors intent for the student activity fee.

Ability to Perform—a student organization may restrict membership based on ability to perform the activities related to the organization's purpose. For example, a student publication may make requirements based on writing skills. A club sport may restrict membership where selection is based on competitive skill or the activity involved is a contact sport thus resulting in a team of one or predominately one gender. Likewise, a choral group may restrict membership based on vocal range or quality which may also result in a chorus or choruses of one or predominantly one gender.

Co-curricular Organization—a group which provides opportunities outside the classroom setting for students to apply classroom theory and/or to acquire knowledge, experience and/or skills.

Cultural Organization—an organization which is primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art, and/or tastes.

Hobby Organization—a group which primarily pursues an activity for relaxation, recreation, or entertainment.

Political Activity—an activity related to: (1) lobbying the principal purpose of which is to influence the passage or defeat of specific legislation; and/or (2) electioneering which encompasses participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office. These restrictions on funding

political activities are not intended to preclude funding of any otherwise eligible student organization which: (1) advocates, as an incidental or insubstantial parts of its activities, the adoption or rejection of legislation; (2) engages in non-partisan analysis, study, or research, and makes the results available to the public; or (3) espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted.

Political Organization—an organization primarily involved with influencing legislation, the administration of governmental policy, and/or the election of candidates for public office.

Religious Activity—an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality.

Religious Organization—an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.

Student Activities Committee—the University faculty/student committee charged by the Vice President for Student Affairs to provide oversight to the student activity fee fund and its allocation by Student Council.

Special Status Student Organizations—Student organizations which have University delegated functions to perform are termed special status. These groups which include but are not limited to Student Council, school councils, University Guides, and University Singers have a University department or a school responsible for each group relative to the delegated functions.

Two groups, Student Council and WTJU, are charged by the Board of Visitors. The other Special Status Student Organizations receive their charge from a University department or school. Because of this relationship to a school or department and the concomitant funding available to the group, Special Status Student Organizations

not charged by the Board of Visitors are ineligible for student activity fee fund allocations.

Student Organizations Eligible for Funding—Contracted Independent Organizations which have been Student Council qualified and comply with the Student Council appropriations process guidelines as well as Special Status Student Organizations charged by the Board of Visitors are eligible for student activity fee funding. Currently, Student Council and WTJU are Special Status Student Organizations eligible for funding.

Supreme Court, U.S.
FILED
SEP 22 1994
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No. 94-329

In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. MINGLE
University General Counsel
and Special Assistant
Attorney General
University of Virginia
Post Office Box 9015
Madison Hall
Charlottesville, VA 22906

(804) 924-3586

PAUL J. FORCH*
Senior Assistant
Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, VA 23219

(804) 786-3810

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Whether a state university is constitutionally required to directly subsidize with public funds the preparation and distribution of a religious student group's publication designed to advocate a particular religious belief.

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No. 94-329

In The

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Petitioners,

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THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondents, the Rector and Visitors of the University of Virginia, *et al.*, respectfully set forth the following pertinent facts to correct and clarify petitioners' statement of the case.

This case involves the long-standing policy of the University of Virginia not to fund religious student organizations and activities. The University determined that the *Wide Awake* student group was ineligible to receive

funding under the Student Activity Fee ("SAF") Guidelines because of its pervasively religious purpose: *Wide Awake's* avowed "mission is to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 272 (4th Cir. 1994). *Wide Awake's* assortment of journal articles, portfolio of advertisements and physical appearance[1] all underscore its self-described proselytizing mission. Petitioners themselves concede that "*Wide Awake* constitutes a 'religious activity' within the meaning of the Guidelines" and agree with the Court of Appeals that the publication is " 'marked by unflagging invocation of religious, specifically Christian themes.' " Petition for Writ of Certiorari, at 7.[2]

Contrary to petitioners' assertion, respondents *do* dispute petitioners' claim that *Wide Awake* "conformed to all applicable, content-neutral funding eligibility requirements, as set out in the Guidelines, other than the prohibition relating to 'religious activities.' " Pet. for Cert. at 7. If, as petitioners claim, *Wide Awake* indisputably fell within the category of "student news, information, opinion, entertainment, or academic communications media group," it would have been funded. Instead, it falls

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[1] As the Court of Appeals noted, "the Christian symbol of the Cross lying in a dark oval field, is printed at the top of each page; another Cross marks the end of each contribution." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 18 F.3d 269, 273 (4th Cir. 1994).

[2] Hereinafter, Pet. for Cert., at ___.

within the category of religious exhortation, which is outside SAF funding eligibility.

Wide Awake did not receive University funding from the Student Council, because the SAF Guidelines prohibit the funding of religious activities and organizations. The funding guidelines, adopted in 1970, "charge the Student Council with administering the SAF 'in a manner consistent with the educational purpose of the University as well as with State and Federal law.' " *Rosenberger*, 18 F.3d at 271. Religious groups are by no means singled out, but represent only one of many categories which are ineligible for funding under the Guidelines. *See Id.*

On July 11, 1991, members of Wide Awake Productions and editors of *Wide Awake* magazine filed suit in the federal district court for the Western District of Virginia against the Rector and Visitors of the University of Virginia.[3] Petitioners claimed that the exclusion of religious activities from funding under the SAF policy had violated their free speech, free exercise of religion and equal protection rights under the First and Fourteenth Amendments to the United States Constitution, as secured by 42 U.S.C. § 1983, and sought declaratory and injunctive relief as well as compensatory damages.[4]

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[3] Ronald J. Stump was also designated as a defendant in his official capacity as Associate Dean of Students at the University.

[4] Along with its Answer denying that it had violated *Wide Awake's* constitutional rights, the University filed a motion to dismiss *Wide Awake's* claim for compensatory damages on Eleventh Amendment immunity grounds. The District Court found it unnecessary to decide this issue in light of its summary judgment ruling in the University's favor. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 795 F. Supp. 175, 178, n. 4 (W.D. Va. 1992).

Both parties moved for summary judgment. Satisfied that there were no genuinely disputed issues of material fact, the district court following oral argument granted summary judgment in the University's favor on all issues. *Wide Awake* appealed the district court's order entered May 20, 1991.

In affirming the judgment of the district court, the Court of Appeals properly recognized that while the Establishment Clause does not prohibit government from accommodating or incidentally benefitting religion, petitioners are demanding a direct and substantial governmental subsidy of religion:[5]

> Direct monetary subsidization of religious organizations and projects . . . is a beast of an entirely different color. A proper respect for the Establishment Clause compels the Rector and Visitors to pursue a course of "neutrality" toward religion. Yet providing SAF monies to

[5] The Court of Appeals did not consider petitioners' free exercise claim: "[i]n granting the University's motion for summary judgment, the district court ruled that the denial of funding to Wide Awake Productions did not unconstitutionally burden the plaintiffs' free exercise of religion . . . Because the plaintiffs failed to assign error to this holding on appeal, . . . we consider it abandoned, and decline to address it herein." *Rosenberger*, 18 F.3d at 277, n. 23. As to petitioners' equal protection claim, the Court of Appeals similarly found that appellants-petitioners had not contested the district court's factual finding that the University had not acted with discriminatory intent in denying funding to *Wide Awake*. *Id.* at 288. "Moreover, the plaintiffs' failure to argue the existence of discriminatory intent as a matter of law on appeal deprives us of jurisdiction to consider the merits of their equal protection claim." *Id.*

> defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake's* Christian mission: "to encourage students to consider what a personal relationship with Jesus Christ means." . . . Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values. Since offering SAF funds to the members of Wide Awake Productions would excessively entangle the University of Virginia with the propagation of the Christian religion, we hold that the Rector and Visitors have proved the existence of a compelling state interest in complying with the Establishment Clause.

Rosenberger, 18 F.3d at 285.

Respondents disagree with petitioners' suggestion that the Court of Appeals held that the Establishment Clause "requires" discrimination against religion, *see* Pet. for Cert. at 12, and seriously doubt that any court would arrive at such a conclusion given both our country's religious heritage and the obvious counterweight of the free exercise clause. In fact, the Court of Appeals specifically stated that the Establishment Clause "compels the Rector and Visitors to pursue a course of 'neutrality' toward religion." *Rosenberger* at 285. This holding was based on the court's factual finding that if the University was required to fund *Wide Awake*, it could not avoid

"state sponsorship" of religion, and "excessive entanglement" in governmental supervision of religion. *See Id.*

Respondents also disagree with petitioners' perception that the Court of Appeals held that the funds were not distributed in a viewpoint neutral manner. *See* Pet. for Cert. at 11. The Fourth Circuit actually held that the University must demonstrate a compelling interest in order to deny *Wide Awake* funding because the SAF Guidelines categorize groups according to content. The Court of Appeals did not hold, as the petitioners suggest, that the University had discriminated against *Wide Awake* on the basis of its point of view. The Court of Appeals merely mentioned in dicta that "when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity." *Rosenberger*, 18 F.3d at 280. Petitioners have distorted the Court of Appeal's holding by quoting the court's words about "viewpoint discrimination" out of context, and using the terms "content" and "viewpoint" interchangeably. *See* Pet. for Cert. at 11. This distinction is important because if viewpoint discrimination were deemed to occur every time a public university creates categories for funding, every student group declared ineligible for funding would be able to attack the school's decision as impermissible viewpoint discrimination.

SUMMARY OF REASONS FOR DENYING WRIT

No important federal question is presented. The holding below turns on the special circumstances of a

state institution of higher education, which must make distinctions in allocating limited funds to student activities and organizations in order to fund those activities most related to its educational purpose. This is not a case where government has sought to censor speech. This is a case where government has rightfully declined to subsidize with public funds the preparation and distribution of religiously proselytizing materials. Moreover, the Court of Appeals' holding is not in conflict with any decision of this Court or that of *any* other United States Court of Appeals. Of the forty-one cases cited in their brief, petitioners fail to cite a single case approving direct governmental funding of a pervasively religious activity.

ARGUMENT

I. NO IMPORTANT FEDERAL QUESTION IS PRESENTED

A. THIS IS NOT A CASE WHERE RELIGION HAS BEEN SINGLED OUT FOR DISCRIMINATORY TREATMENT

The University's "Student Activity Fee Statement of Purpose and Funding Guidelines" make clear that religious activities and organizations are only one of many categories of student groups which are ineligible for funding. Specifically:

> The Board of Visitors has determined that fraternities, sororities, honor societies, political organizations, religious organizations, and special status student organizations not charged by the Board of Visitors are ineligible for funds from

> the student activities fee. An organization is also ineligible when admission is exclusionary in nature and not open to all students or if membership is restricted by reason of age, citizenship, color, disability, gender, race, religion, national origin, political affiliation, sexual orientation, or status as a disabled veteran or veteran of the Vietnam era. Notwithstanding these requirements, a student organization may restrict membership based on ability to perform the activities related to the organization's purpose.

Funding Guidelines, reprinted in Pet. for Cert. at 61a, 62a.

"The Board of Visitors has further determined that the following expenditures and activities do not relate to the educational purpose of the University and thus are not eligible for funding": honoraria or similar fees; religious activities; social entertainment or related expenses; philanthropic contributions and activities; political activities; and activities which would jeopardize the University's tax exempt status. *Id.*, at 62a-63a.

Petitioners' assertion that "this explicit discrimination on the basis of viewpoint would violate the Free Speech and Press Clauses if the viewpoint expressed were nonreligious" oversimplifies the SAF funding scheme. This argument suggests that the Guidelines divide student activities into two categories: religious and nonreligious, the former of which is ineligible for funding, the latter of which is not. However, the fact that

many nonreligious activities are also ineligible for funding undermines petitioners' logic.[6]

For example, if the student Democratic or Republican Club sought funding for campaign literature, or for a magazine which advocated their political platform, funding would be denied under the Guidelines. However, applying petitioners' reasoning, political groups would be able to argue that they were denied funding based on their point of view. They would also claim that, despite their dominant purpose of political advocacy, they should

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[6] Petitioners' assertion that the University "discriminates among various religious viewpoints," citing as "example[s]" the funding of the Muslim Students Association and the Jewish Law Students Association (Pet. for Cert. at 16, n. 8), is belied by the record. The undisputed facts established that these two student groups were funded as "cultural" organizations; neither embraced an evangelical mission nor received funding for any religious activity. The record reviewed by the district court also revealed that another group plaintiffs-petitioners initially assailed as evincing unequal treatment, Black Voices, declined to seek SAF funding after the organization shifted its purpose from simply singing Gospel music as a black cultural activity to engaging in evangelizing as a religious activity.

It is difficult to reconcile petitioners' persistent argument of "viewpoint discrimination" with the district court's finding on the equal protection issue that petitioners presented no evidence of "discriminatory intent," a finding petitioners did not pursue on appeal. *See, Rosenberger*, 18 F.3d at 288. Furthermore, in testing the University's funding decision under the Establishment Clause, the Court of Appeals declared that "[t]he record gives us no reason to doubt that the Rector and Visitors' expressed purposes are 'sincere and not a sham.' . . . Therefore, we hold that the guidelines' proscription against funding of 'religious activities' is not motivated wholly by an impermissible purpose." *Id.* at 284.

receive governmental monetary support as "student news, information or opinion." A philanthropic activity or a student Ku Klux Klan organization could make similar viewpoint discrimination arguments if denied funding under the Guidelines. A policy which defines eligibility for any benefit must make some reasonable distinctions based on the content of the activities in question. While the University does not fund religious activities, neither does it uniformly fund all nonreligious activities.

B. THIS CASE DOES NOT PRESENT A "RECURRING AND CONTENTIOUS ISSUE"

Petitioners have cited no other cases that have considered this identical legal issue. Petitioners do cite *Tipton v. University of Hawaii*, in which the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the University of Hawaii and its policy with regard to funding of student activities. 15 F.3d 922 (9th Cir. 1994). However, the *Tipton* case, which was also resolved on summary judgment, hardly supports the notion that this is a "recurring and contentious issue." Although the Court of Appeals in *Tipton* expressed "no opinion whether the events for which [the student religious organization] sought funding . . . could be subsidized without violating the Establishment Clause," *Tipton*, 15 F.3d at 926, n. 3, the Court allowed the University "wide latitude in adopting a funding policy to allocate the limited resources available to promote students' extracurricular activities." *Id.* The court also suggested that a university policy excluding the funding of

all religious groups would "likely [be] permissible . . . so long as it is uniformly applied." *Id.* at 928.

Petitioners have not established that an important federal question has been implicated through the adoption of funding guidelines at various universities. Nonetheless, if this Court were to reverse the Court of Appeals decision, the effect would be to create recurring contention, since the reversal would invalidate any eligibility requirements for funding student activities and organizations. If the government cannot exclude religious activities and organizations from public funding in order to avoid a violation of the Establishment Clause, it logically follows that all other forms of nonreligious expression, protected by the Free Speech clause and not restricted by the Establishment Clause, would have to be funded also. As a consequence, funds would have to be either equally divided among all student groups who want them or distributed on a first-come, first-serve basis. Such a proposition would effectively emasculate "the right of the University to make academic judgments as to how best to allocate scarce resources." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

II. THE HOLDING BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND LOWER COURTS

Petitioners' attempt to mesh all cases dealing with the Establishment Clause may, at first blush, create the appearance of a conflict among various courts and opinions. However, as Justice O'Connor recently made clear,

"[e]xperience proves that the Establishment Clause cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring).[7]

A. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE DISCRIMINATION AGAINST RELIGIOUS SPEECH; TO THE CONTRARY, COURTS HAVE CONSISTENTLY HELD THAT THE ESTABLISHMENT CLAUSE REQUIRES GOVERNMENT NEUTRALITY TOWARD RELIGION

Petitioners assert the obvious when they note that "public universities may not deny funding to student groups or publications on the basis of their viewpoint." Pet. for Cert. at 15, citing *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). However, the *Rosenberger* case does *not* involve a situation where a student group was denied University recognition or access to campus facilities because of its speech. Nor does the case

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[7] The fact that Justice O'Connor made these statements in the course of critiquing a rigid application of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has no bearing on the case at hand. Respondents note that the outcome of this case is not contingent upon strict adherence to the *Lemon* test. The Court of Appeals' holding is supported by cases decided prior to *Lemon*. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Even if this Court abandons the *Lemon* test altogether, there is no reason to expect that all principles of the Establishment Clause developed by the Supreme Court over the years will be rendered obsolete.

involve administrative censorship or as in *Gohn*, withdrawal of financial or physical resources because the student group's viewpoint was found objectionable.

Petitioners argue that the *Rosenberger* and *Tipton* decisions are in conflict with other cases holding that a state cannot discriminate against religious speech in a public forum. *See, e.g., Fairfax County School Bd. v. Fairfax Covenant Church*, 17 F.3d 703 (4th Cir. 1994), *cert. denied*, 114 S.Ct. 2166 (1994).[8] Petitioners also rely on this Court's holding that excluding religious speech from the use of facilities in nonpublic forums on the basis of the speaker's religious point of view constitutes impermissible viewpoint discrimination. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993). However, whether the forum is public, limited public or nonpublic, the crucial distinction between these cases and the case at hand is that they all involved general access to physical space, not a direct and substantial payment of government funds. *See also Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th. Cir. 1994).

The standard for review before this Court is not whether petitioners find the principles derived from a comparison of various cases construing different aspects of constitutional law incongruous. Rather, the proper

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[8] Respondents note that two of the cases cited by petitioners, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), and *Fairfax County School Board v. Fairfax Covenant Church*, 17 F.3d 703 (4th Cir. 1994), *cert. denied*, 114 S.Ct. 2166 (1994), were decided by the Fourth Circuit, the second only months before *Rosenberger*. Though theoretically possible, it seems unlikely that the Fourth Circuit would have decided *Fairfax Covenant* and *Rosenberger* in a contradictory manner.

inquiry is whether a federal court of appeals "has rendered a decision in conflict with the decision of another United States court of appeals on the same matter" or "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct.R. 10.1.

Cases involving equal treatment of religious and nonreligious speech in granting access to facilities have absolutely no bearing on this case. Religious and nonreligious speakers can simply wait their turn to use physical space; the allocation of public funds, on the other hand, is not only a very direct subsidy, it requires government discretion and supervision. Nonetheless, petitioners have been contending throughout this protracted litigation that *Widmar v. Vincent*, 454 U.S. 263 (1981), and more recently, *Lamb's Chapel*, control the analysis of this case. Respondents maintained and continue to maintain that public forum cases, of which *Widmar* is the chief example, are entirely distinguishable from the case at hand, because they concern physical space, not funding. The Court of Appeals reached the same conclusion:

> [T]he proper analysis of this case lies under the line of authority dealing with content-based discrimination relating to government-generated benefits or burdens. The long line of public forum cases have taken "forum" in a fairly literalistic way involving physical space, and we do not see how it advances the jurisprudence to wrench that word out of its accepted form to encompass this type of case already subject to First Amendment scrutiny.

Rosenberger v. Rector and Visitors, 18 F.3d at 287.

The University would clearly be prohibited from denying religious groups access to generally available meeting space on the University grounds, and in fact it provides such access. However, when a state university is asked to pay for speech, the issue is no longer whether private speech should passively be allowed to occur, but whether the state may directly subsidize a religious belief with public funds. The potential harm to religion is manifest: government largess comes with its "strings" including supervision and audits.[9]

The University's treatment of religion has nothing to do with whether religious belief and practice is popular or unpopular. Like the religion clauses of the First Amendment, the funding guidelines adopted by the Board of Visitors were not designed to punish or penalize religious activity, but to ensure government neutrality

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[9] Petitioners' argument that religion should never be treated differently from other forms of activity under the federal Constitution would strip the First Amendment religion clauses of any meaning. Although religion or religious activity may not be eligible for certain benefits the state offers to secular groups or activities, this is not the end of the inquiry. In other contexts, the Free Exercise clause of the First Amendment affords religion advantages over other forms of activity and expression protected only by the Free Speech clause.

For example, whereas the *Journal of Law & Politics* would not be permitted, as a Contracted Independent Organization (CIO), to discriminate on the basis of religion or other impermissible factors in the selection of its editorial board, *Wide Awake* would presumably be permitted to select its Editor on the basis of the strength of the individual's religious convictions. *Wide Awake* is protected by the free exercise clause; the *Journal of Law & Politics* and all other nonreligious student publications and organizations are not.

toward religion so that all religious faiths may flourish without government intervention or supervision. As the Court of Appeals recognized:

> The Rector and Visitors have not attempted to ban the publication of *Wide Awake*; indeed, they have supported its religious mission by allowing the members of Wide Awake Productions access to University meeting and printing facilities equal to that afforded all other CIOs. The University permits the plaintiffs to distribute *Wide Awake* on its grounds without limitation.

Rosenberger, 18 F.3d at 284.

B. THIS CASE DOES NOT PRESENT THIS COURT WITH A MEANINGFUL OPPORTUNITY TO REFINE ESTABLISHMENT CLAUSE JURISPRUDENCE; THE ALLOCATION OF PUBLIC FUNDS TO PAY FOR RELIGIOUS PROSELYTIZING IS NOT "NEUTRALITY," AND CONFLICTS WITH THE ESTABLISHMENT CLAUSE

Petitioners concede "that the decision below . . . finds support in older cases." Pet. for Cert. at 21. However, according to petitioners, there is a conflict between two categories of cases because one line requires neutrality with respect to public facilities, and the other requires discrimination with respect to "direct monetary subsidization." Pet. for Cert. at 22. To provide evidence of this purported conflict, petitioners cite a hodgepodge of cases dealing with access to facilities, distribution of written materials in public school, and religious symbols in a public forum. *See* Pet. for Cert. at 18-19 and 20, n. 11 and

n. 12. The cases are all actually crystal clear: when direct monetary subsidization is involved, there is an Establishment Clause violation because the benefit to religion is *not* neutral. Petitioners beg the question by framing the central issue as whether a "wide range of activities" receives the "neutral" benefit being offered. No court has ever held that direct funding of religious activities and programs is neutral.

Respondents readily concede that it would be wrong for the University to fund some political or religious activities and not others, or to defund publications for expressing a particular viewpoint, or to refuse to fund organizations which qualify for funding under the Guidelines because of the views of the organization. *See, e.g., Gay & Lesbian Students Association v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). However, pure viewpoint discrimination is very different from content-based decisions which are viewpoint neutral. In his concurring opinion in *Widmar v. Vincent*, Justice Stevens emphasized that there is nothing constitutionally suspect in a public university making content-based classifications or assessments in allocating limited resources:

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the *content* of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for the inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities,

> they necessarily make decisions concerning the *content* of those activities.

454 U.S. 263, 278 (1981).

Indeed, numerous cases provide support for the proposition that the state cannot directly fund religious activity without violating the Establishment Clause. In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), decided well before *Lemon v. Kurtzman*, Justice Black explained:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . **No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.** Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Bd. of Ed., 330 U.S. at 15. (emphasis added). Even before school prayer and Bible reading in public school classrooms were thought to violate the Establishment Clause, *see Engel v. Vitale*, 370 U.S. 421 (1962) and *Abingdon School Dist. v. Schempp*, 374 U.S. 203 (1963), the Supreme Court declared that the Establishment Clause prohibits the use of public funds, of any amount, to support religious activities.[10] Perhaps direct governmental funding of religious activity so obviously violates

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[10] It was permissible for the state to fund the cost of bus transportation, at issue in *Everson*, because bus transportation is not a religious activity.

the Establishment Clause that the point is not always explicitly made. However, the principle has consistently been enunciated in a variety of religion cases.

For instance, this Court has invalidated, on Establishment Clause grounds, various state programs that sought to subsidize sectarian practices and activities. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (subsidy of parochial school salaries for teachers of secular subjects); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (maintenance and repair grants for parochial schools); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (reimbursement to parochial schools for expenses of teacher-prepared test); *Sloan v. Lemmon*, 413 U.S. 825 (1973) (tuition reimbursement and grant program for parochial schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of instructional materials and equipment to non-public schools); *Wolman v. Walter*, 433 U.S. 229 (1977) (field trip transportation services to non-public school students); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) (use of public school programs and personnel on private school premises).

In the few cases involving governmental aid to higher education, this Court likewise emphasized that the Establishment Clause prohibits governmental financial assistance to higher education institutions for pervasively sectarian purposes. *See Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). In the university context:

> **Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that**

> a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.

Hunt v. McNair, 413 U.S. at 743.

This Court's opinion in *Witters v. Wash. Dept. of Services for Blind*, 474 U.S. 481 (1985), is not to the contrary. The *Witters* decision distinguished between two scenarios in which "money previously in the possession of the State is conveyed to a religious institution." *Witters*, 474 U.S. at 486. While there is no Establishment Clause violation when a State issues a paycheck to one of its employees who then donates all or a part of the money to a religious institution, *Id.*, 474 U.S. at 486-87, "[i]t is equally well settled . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.*, 474 U.S. at 487, citing *Grand Rapids School District v. Ball*, 473 U.S. at 394.[11] Relying on *Witters*, this Court reiterated in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, 2466 (1993), that "government programs that neutrally provide benefits to a broad class of citizens

[11] Moreover, on remand, the State Supreme Court, at this Court's invitation, held in *Witters* that the state constitutional prohibition against applying public monies to any religious instruction prohibited the granting of the neutral aid for a religious education. *Witters v. State Com'n for the Blind*, 771 P.2d 1119 (Wash. 1989). The University would similarly be prohibited from funding religious student organizations under Article IV, § 16 of the Virginia Constitution, as respondents argued in briefs submitted to the district and appellate courts below.

defined without reference to religion are not readily subject to an Establishment Clause challenge. . . . "

Nor do cases involving indirect subsidies to religious and secular activities alike have any bearing on this case. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). As noted by the Court of Appeals, the *Rosenberger* case, which "involves a direct governmental subsidy of religious expression rather than a mere exemption from the payment of duties, . . . is not directly on point with *Texas Monthly*." *Rosenberger*, 18 F.3d at 283, n. 31. Although exempting religion from a burden (such as a tax) results in an "indirect economic benefit," "[t]ax exemptions . . . constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring).

Reversal of the Court of Appeals' decision would also expose the University to suits by other students or parents for refunds of the student activity fee.[12] Although this issue has not been treated uniformly by the courts, if the University is required to fund religious organizations and activities, it risks expensive challenges from individuals who object to such use of the mandatory student

[12] Respondents disagree with petitioners' claim that this issue "is not raised in this case." Pet. for Cert. at 15, n. 7. Respondents raised this issue both at the district court and Court of Appeals level. Most recently, pursuant to Fed. R. App. P. 28 (j), respondents called the Court of Appeals' attention to the California Supreme Court's opinion in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, *cert. denied*, 114 S.Ct. 181 (1993) during the pendency of the case.

fees. In addition to raising Establishment Clause objections, litigants could draw upon decisions of this Court that restrict the use of mandatory professional association fees and union dues for activities that deviate from the organization's established purpose. *See Keller v. State Bar of California*, 496 U.S. 1 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The decision of the California Supreme Court in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, *cert. denied*, 114 S.Ct. 181 (1993), illustrates the basis and impact of a challenge from students who object to uses of mandatory fees for purposes that are not related to the University's educational mission. As petitioners themselves point out, some decisions "have permitted dissenting students to demand refunds of portions of the student activities fee that are used to support the expression of ideological viewpoints with which they disagree." Pet. for Cert. at 15, n. 7.

If required to fund *Wide Awake*, in the short term, the University would be supporting a single religion in derogation of the Establishment Clause. As competing religions began to seek University funding, University agents would be compelled to scrutinize the worth of various religious organizations and activities in an attempt to decide how much money each group should receive, why one should receive more than another, and why one project or mission would be worthier than another.

Petitioners' "constitutional challenge" to the funding guidelines appears to be a constitutional challenge to the Establishment Clause itself. If religion cannot be treated differently than political ideas, ideology or viewpoints on

various issues, what does the Establishment Clause stand for? Petitioners' suggestion that the Free Speech Clause should operate to nullify the Establishment Clause is not supported by the Constitution, opinions rendered by this Court or any other federal court, or common sense.

Even if the case could be analyzed within a different framework which does not require the compelling interest standard, this case does not offer the Court a meaningful opportunity to differentiate between cases involving the government's ability to allocate its limited resources, and cases involving equal access of religious and secular groups to neutral benefits. This case has evolved into an academic debate about the logic and soundness of doctrine itself, and does not present a true conflict among courts on issues relating to the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

The Rector and Visitors of the University of Viriginia, *et al.*

By: Counsel

JAMES J. MINGLE
University General Counsel
and Special Assistant
Attorney General
University of Virginia
Post Office Box 9015
Madison Hall
Charlottesville, VA 22906
(804) 924-3586

PAUL J. FORCH*
Senior Assistant
Attorney General
Office of the Attorney
General
101 North Eighth Street
Richmond, VA 23219
(804) 786-3810

*Counsel of Record

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No. 94-329

In The Supreme Court of the United States

October Term, 1994

Ronald W. Rosenberger, *et al.*,
Petitioners,

v.

The Rector and Visitors of the University of Virginia, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

Michael W. McConnell *
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

Michael P. McDonald
Center for Individual Rights
1300 19th Street, N.W., 260
Washington, D.C. 20036
(202) 833-8400, ext. 102

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-329

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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1. The decision below is a particularly stark example of doctrinal confusion and contradiction: the Fourth Circuit held that the University of Virginia's exclusion of religious periodicals from the Student Activities Fund ("SAF" or "Fund") is a violation of the viewpoint-neutral principles of the Free Speech and Press Clauses, but also held that this discrimination is required by the Establishment Clause. Pet. App. 39a. As we showed in the Petition, this holding conflicts with other appellate decisions in two ways. First (Pet. 15-19), the courts are split on the question of whether the Establishment Clause trumps what would otherwise be a free speech claim. Second (Pet. 19-20), the courts are split on whether the Establishment Clause can be violated by the neutral provision of benefits to a wide range of activities, religious as well as nonreligious. Moreover (Pet. 20-25), the decision

below is in conflict with several recent decisions of this Court (while admittedly consistent with older cases not easily reconcilable with current constitutional doctrine).

Nothing in the University's Brief in Opposition detracts in the slightest from the existence, importance, or recurring nature of this constitutional conflict. Instead, the University hopes to avoid the issue by the simple device of characterization. In the University's eyes, its deliberate exclusion of religious viewpoints is not "discrimination" but "neutrality" toward religion. Br. in Opp. 15, 16. If one accepts that premise (discrimination is really "neutrality") then the conflict perceived by the Court of Appeals ceases to exist and all the cases become "crystal clear" (Br. in Opp. 17). But the University's Brief begs the question: *why* is it "neutral" to exclude an otherwise eligible religious publication, solely on the basis of its religious viewpoint, when (as the University concedes, Br. in Opp. 17), "neutrality" normally requires that the University distribute funds on the basis of objective factors, not including the viewpoint of the publication? The University admits it would not be "neutral" toward gay rights if it refused to subsidize a publication devoted to propagating the point of view of the Gay & Lesbian Students Association. *Id.*, citing *Gay & Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 361 (8th Cir. 1988). Why is "neutrality" different for religion?

Perhaps there is an answer to this. But it is hard to deny—and the University does not deny—that the lower courts are perplexed and divided about how to answer it. Sometimes religious speakers are given equal rights; sometimes they are treated as second-class citizens. See Pet. 18-19 & nn. 10-11. The Fourth Circuit, to its credit, did not attempt to hide behind euphemisms. It openly acknowledged that the University's Guideline "creates an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression" (Pet. App. 26a). The question—whether this discrimination is required by the Establishment Clause—

is squarely presented in this case. This Court's guidance is urgently needed.

2. A large part of the University's Brief in Opposition is devoted to various attempts to avoid the issue. We will address each of these in turn.

a. The University begins with the assertion (Br. in Opp. 6-7) that "[t]he holding below turns on the special circumstances of a state institution of higher education, which must make distinctions in allocating limited funds to student activities and organizations in order to fund those activities most related to its educational purpose." But as the opinion below reveals, *nothing* in the Fourth Circuit's judgment "turns" on any "special circumstances" unique to universities. Rather, the reasoning is broad. Denial of assistance on account of *Wide Awake*'s religious message, according to the court below, is a penalty on the exercise of free speech rights; but providing benefits, even on a neutral basis, would "advance religion" and "entangle" church and state in violation of the Establishment clause. As the Petition demonstrated, the same doctrinal conflict between Speech and Establishment has appeared in a wide variety of contexts. Pet. 18-19 & nn. 10-11.

b. The University admits that there is "the appearance of a conflict among various courts and opinions" (Br. in Opp. 11), but argues against review on the ground that none of the cases petitioners have cited involved "this identical legal issue." *Id.* at 10. But that depends on how narrowly the issue is framed.

Even if one treats this case as solely about public university student activities funds, the University's claim is inaccurate. *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994), also raised the constitutionality of excluding otherwise eligible student organizations from student activities funds on account of their religious character. The only substantial difference between the two cases is that *Tipton* was solely a facial challenge. To be sure, as the University points out (Br. in Opp. 10), the

Ninth Circuit's constitutional analysis in *Tipton* is at odds with that of the Fourth Circuit here (though the utlimate result, upholding discriminatory exclusion of student religious speech, is the same). The Ninth Circuit essentially upheld University discretion, while the Fourth Circuit held that the Establishment Clause compels the University to exclude religious publications. This disagreement over constitutional principles is a reason for this Court to grant the Petition, not to deny it. Moreover, *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988), is "identical" to this case, except that the viewpoint involved in *Gohn* is secular. The University may think that is a persuasive reason for reaching opposite outcomes. Petitioners do not.

More fundamentally, in evaluating the certworthiness of this case, there is no reason to confine attention to cases raising the "identical" legal issue. The point is that the governing *principle* of the decision below is of recurring significance, and has divided the courts of appeals in a wide variety of contexts. This Court has frequently granted certiorari in Establishment Clause cases that raise important general principles of law, even when the particular context is unusual and the "identical" issue is unlikely ever to repeat itself (see, *e.g.*, *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994)), or where lower court opinions on the specific issue are not in conflict (see, *e.g.*, *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993)).

c. The University argues strenuously that its exclusion of *Wide Awake* was not based on its viewpoint. See Br. in Opp. 8-9.[1] This argument is completely untenable

[1] The University denies (Br. in Opp. 6) that the Fourth Circuit found that *Wide Awake* had been excluded on the basis of its viewpoint, suggesting that petitioners confuse the concepts of content and viewpoint discrimination. We are not sure why this matters, since content discrimination, in itself, is presumptively unconstitutional and requires strict scrutiny. *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). But in any event, the Fourth Circuit unquestionably *did* find the exclusion of *Wide Awake* to be based on viewpoint. Four times in its opinion, the Court referred to "content and viewpoint discrimination" as the gravamen of the constitutional complaint. Pet. App. 17a, 21a. Moreover, the central free speech holding of the court is as follows:

> [W]hen funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity. Although government need not subsidize exercise of a constitutional right, the lack of an affirmative duty of financial support does not mean that government may, in general, penalize exercise of constitutional rights by withholding from their possessors an otherwise discretionary benefit. We conclude that the Rector and Visitors' erection of a prior restraint against University funding of such "religious activities" as the publication of religious expression in *Wide Awake* constitutes precisely such a penalty. . . . The Rector and Visitors' funding proscription thus creates an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression.

Pet. App. 25a-26a (citations and paragraph break omitted). The University calls this finding of viewpoint discrimination "dictum" (Br. in Opp. 6); but manifestly it is not.

[2] The University argues (Br. in Opp. 7-8) that the exclusion of "religious activities" is not discriminatory because this is "only

after this Court's decision in *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141 (1993). In *Lamb's Chapel*, the government excluded any group that would use its property "for religious purposes." *Id.* at 2144. This is indistinguishable from the University Guideline, which excludes "religious activities." In *Lamb's Chapel*, the restriction was applied to a group that wished to show a film addressing issues of child rearing from a religious perspective. In this case, the University applied the restriction to a group that wished to produce a magazine addressing a variety of campus, personal, and community issues from a religious perspective. This Court had no hesitation in treating the exclusion in *Lamb's Chapel* as an instance of viewpoint discrimination. See 113 S. Ct. at 2147. The same is true here.[2]

d. The University raises the spectre (Br. in Opp. 11) that, if the government cannot discriminate against religious speakers, "all other forms of nonreligious expression . . . would have to be funded also," which would "effectively emasculate" the right of the University to make academic judgments. But as the University concedes (Br. in Opp. 12; 17), the University is *already* forbidden to discriminate against nonreligious groups on the basis of viewpoint. This has apparently been accomplished without disruption. We only ask that similar protection be extended to religious viewpoints.[3]

e. The University claims that reversal of the decision below would "harm" religion, because SAF funding would lead to "supervision and audits." Br. in Opp. 15. Whatever the merits of this argument in the abstract, it has no application here. University funds would not go to the student group; they would go to the printer. The University is free to audit and supervise the direct recipient of the funds—the printer—to make sure that they are

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one of many categories of student groups which are ineligible for funding." But this *is* the only category that is based on point of view. The exclusions for "honoraria or similar fees; . . .; social entertainment or related expenses; philanthropic contributions and activities; political activities; and activities which would jeopardize the University's tax exempt status" (Pet. App. 62a-63a) are *not* based on viewpoint. Nor are the exclusions of fraternities, sororities, honor societies, or political organizations based on viewpoint. It is significant that—whatever the term "political activities" may mean—it does not extend to a publication that advocates a political point of view, for many of the funded publications at the University do that. In any event, in *Lamb's Chapel*, religious groups were not the only groups excluded from the facilities. That did not dissuade the Court from finding that the religious exclusion was viewpoint discriminatory.

[3] Similarly, the University expresses worry (Br. in Opp. 21-22) that it might have to provide a refund of the mandatory student activities fee to those who object to the funded activity. But the University already assumed that risk when it began to fund controversial secular activities. There is no difference, for purposes of refund litigation, between secular and religious speech.

used for properly authorized purposes. There would be no legitimate occasion to audit or supervise Wide Awake Productions itself.

3. The University's only serious argument is that cash subsidies must be treated differently than other forms of public benefit (such as access to government land or meeting rooms, tax subsidies, police and fire protection, and in-kind assistance to religious schools). See Br. in Opp. 13-15, 17-21. We do not (indeed, we cannot) claim that the University's position is wholly without support in some of this Court's older precedents.[4] But the University's argument simply illustrates the difficulty and importance of this case. It is our position that the outmoded distinctions between various forms of aid have no relation to the purposes of the Establishment Clause and should be replaced by a general requirement of neutrality. The University takes the opposite position. This is a recurring and imporant issue, and warrants consideration by this Court.

4. The Brief in Opposition is itself an argument for certiorari. If there is any doubt that university administrators and others who have the responsibility for interpreting and enforcing constitutional rights in the first instance have a distorted notion of the protections for religious speech under the First Amendment, the Brief in Opposition dispels it. "If religion cannot be treated differently [*i.e.*, less favorably] than political ideas, ideology,

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[4] The University plainly overstates its case when it declares (Br. in Opp. 17) that "[n]o court has ever held that direct funding of religious activities and programs is neutral." Among other decisions, this overlooks *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), in which this Court unanimously rejected the argument that the Establishment Clause prevents a state from paying the tuition for religious courses at a Bible College. To pay tuition for religious teaching is not constitutionally distinguishable from paying printing costs for a religiously-oriented publication.

or viewpoints on various issues," the University asks (Br. in Opp. 22-23), "what does the Establishment Clause stand for?" Let us state our answer: the Establishment Clause stands for neutrality, not hostility, toward religion. It prevents the government from favoring or preferring religious over secular ideas, institutions, or people, in such a way as to induce or encourage the practice of one religion, or religion in general. But it does not require discrimination against religious speakers.

The University's position in this case, we believe, is symptomatic of a widespread misunderstanding about the fundamental principles of religious freedom under the First Amendment. This case provides an ideal opportunity to dispel that misunderstanding.

CONCLUSION

For these reasons, and those stated in the Petition, this Court should grant the Petition for Certiorari.

Respectfully submitted,

MICHAEL W. MCCONNELL *
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W., 260
Washington, D.C. 20036
(202) 833-8400, ext. 102

* Counsel of Record

VENUE

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the claims occurred in the County of Albemarle, Commonwealth of Virginia, which is the site of the University of Virginia.

PARTIES

5. Plaintiff RONALD W. ROSENBERGER, a student at the University of Virginia, is presently a resident of the Commonwealth of Virginia and was a resident of the Commonwealth of Virginia at all times relevant herein. The unincorporated organization of which he is a member, plaintiff WIDE AWAKE PRODUCTIONS, is and was at all times relevant herein a Contracted Independent Organization ("CIO") at the University of Virginia, with its principal operations in the County of Albemarle, Commonwealth of Virginia. The publication of which he is Editor-in-Chief, plaintiff WIDE AWAKE MAGAZINE, is and was at all times relevant herein a journal of news, commentary and opinion published and distributed by plaintiff WIDE AWAKE PRDUCTIONS at the University of Virginia in the County of Albemarle, Commonwealth of Virginia. Plaintiff ROBERT J. PRINCE is a student at the University of Virginia and the Managing Editor of WIDE AWAKE MAGAZINE. Plaintiff GREGORY W. MOURAD is a student at the University of Virginia and Executive Editor of WIDE AWAKE MAGAZINE. Plaintiffs ROBERT J. PRINCE and GREGORY W. MOURAD are and/or at all times relevant herein were residents of or located in the County of Albemarle, Commonwealth of Virginia. Unless otherwise specified herein, plaintiffs will be referred to collectively as "*Wide Awake.*"

6. Defendants EDWARD E. ELSON, W.L. LYONS BROWN, JR., ROBERT G. BUTCHER, JR., N. THOMAS CONNALLY, M.D., HOVEY S. DABNEY, WALLER H. HORSLEY, J. THOMAS HULVEY,

M.D., EVANS B. JESSEE, PATRICIA M. KLUGE, ARNOLD H. LEON, LEIGH B. MIDDLEDITCH, JR., ELIZABETH D. MORIE, FREDDIE W. NICHOLAS, SR., S. BUFORD SCOTT, JESSE B. WILSON, III, THOMAS E. WORRELL, JR., ADAM S. ARTHUR, and ALEXANDER G. GILLIAM, JR. are sued in their capacities as members of defendant RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA ("Board of Visitors"). Upon information and belief, the Board of Visitors of the University of Virginia is a corporation established by the General Assembly of the Commonwealth of Virginia ("General Assembly"). The Board of Visitors is subject to the control of the General Assembly of the Commonwealth of Virginia. The members of the Board of Visitors are appointed by the Governor of Virginia. The Board of Visitors, in accordance with the Constitution of the Commonwealth of Virginia and with law, formulates policy, makes regulations and exercises such control over the University of Virginia as it deems expedient. Upon information and belief, the Board of Visitors may lawfully delegate this power. Under authority of the General Assembly, the Board of Visitors has exclusive jurisdiction over the internal organization, government and management of the University of Virginia. The University of Virginia is an institution of higher education that receives public funds from the Commonwealth of Virginia.

7. Defendant RONALD J. STUMP is and was at all times relevant herein Associate Dean of Students at the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia. Defendant RONALD J. STUMP is sued in his capacity as Associate Dean of Students at the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia. The Student Activities Committee is a University of Virginia committee composed of faculty members, administrators and students. The Student Activities Committee is charged by the Vice Presi-

dent for Student Affairs of the University of Virginia to provide oversight of the student activities fee fund and its allocation by the Student Council.

GENERAL ALLEGATIONS

8. As provided for in the Code of Virginia Title 23, Chapter 9, Article 2, Sections 23-69 to 23-80, the Board of Visitors is charged with the authority to manage the affairs of the University of Virginia. One of its responsibilities is the general oversight of student activities. To this end, the Board of Visitors has adopted policies with regard to the operation and funding of student organizations. Such policies include the requirement that the Board of Visitors (or its delegate) approve the constitutions and charters of these organizations; insure that these organizations adhere to all state, city and university regulations and statutes; and establish guidelines for the funding of such organizations from Student Activities Fund ("SAF") monies.

9. The Student Council of the University of Virginia is a Special Status Student Organization that conducts its affairs pursuant to a delegation of authority from the Board of Visitors. Currently and at all times relevant herein, the Board of Visitors sets forth and has set forth the guidelines and procedures for the distribution of SAF funds to Contracted Independent Organizations. Currently and at all times relevant herein, the Student Council implements and has implemented these guidelines and procedures.

10. The Student Council has a number of subcommittees, including an Appropriations Committee. The Appropriations Committee is chaired by the Student Council's Vice-President for Student Organizations.

11. During the period relevant to this lawsuit, the Student Council, upon recommendation of its Appropriations Committee, has regularly funded CIOs from SAF

funds. Upon information and belief, this practice dates back at least to 1973.

12. Upon information and belief, the University of Virginia has charged at all times relevant herein and currently charges each student a compulsory student activity fee of $14 per semester. There is no procedural or other mechanism by which a student may decline to pay the fee. These compulsory student fees are deposited into the University of Virginia Student Activities Fund.

13. Upon information and belief, there are approximately 343 CIOs at the University of Virginia. Upon information and belief, approximately 100 CIOs were funded with SAF monies during the 1990-1991 academic year under criteria and guidelines established by the Board of Visitors. Upon information and belief, acting pursuant to its authority from the Board of Visitors, the Student Council allocated approximately $237,662.00 to CIOs for that time period.

14. The Board of Visitors guidelines that are applied by the Student Council prohibit the funding of "religious activities" with SAF monies.

15. Upon information and belief, CIOs receiving SAF funding in the past have included organizations that express religious beliefs and engage in religious activities. The Student Council has previously funded with SAF monies, for example, a student gospel group, Black Voices. Upon information and belief, in the hearings that are part of the SAF funding process, the representative of Black Voices stated that the group engages in religious activity. Upon information and belief, the Student Council has also funded in the past and continues to fund with SAF money the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society. The constitutions, charters and public statements and actions of these CIOs indicate that (at the time the defendants agreed to fund them) they engaged in and continue to engage in religious activity and expression.

16. Upon information and belief, acting pursuant to its authority from the Board of Visitors, the Student Council uses and has used in the past SAF funds to support at least fourteen "student news, information, opinion, entertainment or academic communications media groups." These funded publications and organizations have expressed and continue to express and contain both religious and secular matter.

17. Certain other SAF-funded student organizations express particular worldviews which are often inconsistent with or antagonistic to various religious beliefs. These funded CIOs include organizations that advocate gay and lesbian viewpoints, environmentalism, feminism, animal "rights," "prisoners' rights," and abortion "rights."

18. In January of 1991, Plaintiff RONALD W. ROSENBERGER, on behalf of plaintiffs WIDE AWAKE PRODUCTIONS and WIDE AWAKE MAGAZINE, submitted an application for Student Activities Fund benefits to the Student Council Appropriations Committee. This application for funding was in the amount of $5,862.00 to support the publication of *Wide Awake* magazine.

19. On or about February 26, 1991 the Student Council Appropriations Committee turned down plaintiffs' request for Student Activities Fund funding. A February 26, 1991 letter from the Student Council's Vice President for Student Organizations to plaintiff RONALD W. ROSENBERGER stated that the reason for the denial of funding was that the Student Council Appropriations Committee had "determined your organization's request could not be funded as it is a religious activity. The determination was made after reviewing your first issue of *Wide Awake*."

20. No reason other than the alleged status of *Wide Awake* as a "religious activity" was offered as a basis for the denial of funding.

21. The application of *Wide Awake* for Student Activities Fund benefits conformed with all applicable, content-neutral Student Activities Fund requirements. In particular, at least 51% of *Wide Awake*'s members are students; the organization's officers are all full-time, fee-paying students; the group keeps an updated copy of its constitution on file at the University of Virginia Student Council offices; and *Wide Awake* has signed all anti-discrimination disclaimers that are required.

22. Pursuant to procedures established by the Board of Visitors and implemented by the Student Council, *Wide Awake* appealed the Student Council Appropriations Committee's denial of funding to the full Student Council on or about March 3, 1991.

23. On or about March 19, 1991 the full Student Council denied *Wide Awake*'s appeal and affirmed the Student Council Appropriations Committee's denial of funding. Upon information and belief, the Student Council stated no reasons for the denial of benefits to *Wide Awake* other than its alleged status as a "religious activity."

24. Pursuant to Board of Visitors and Student Council procedures, *Wide Awake* appealed the decision of the Student Council to the Student Activities Committee.

25. On or about April 8, 1991 the Student Activities Committee held a public hearing on the *Wide Awake* appeal.

26. On or about April 15, 1991 the Student Activities Committee voted to reaffirm the denial of funding to *Wide Awake*. Upon information and belief, the Student Activities Committee stated no reasons for the denial of benefits to *Wide Awake* other than its alleged status as a "religious activity."

27. *Wide Awake* has exhausted all internal and administrative procedures provided by the University of Virginia.

28. Defendants have denied and continue to deny SAF benefits to plaintiffs solely and expressly on the basis of plaintiffs' viewpoint or the content of their expression.

29. Because plaintiffs have been denied SAF benefits, they are denied access to certain space and facilities at the University of Virginia, including but not limited to computers, printers and other equipment located in Peabody Hall at the University of Virginia.

30. Upon information and belief, the facilities in Peabody Hall containing computers, printers and other equipment are available for use and have been available for use at all times relevant herein by SAF-funded Contracted Independent Organizations upon payment of a nominal fee.

31. By establishing, implementing and administering the SAF and the SAF fund-allocation policy, defendants have created a limited public forum that offers access to benefits designed to support and encourage the exchange of a variety of viewpoints on the campus of the University of Virginia.

32. Defendants have impermissibly and unlawfully denied plaintiffs access to the limited public forum because of plaintiffs' viewpoint or the content of their speech.

33. Defendants cannot demonstrate a compelling interest sufficient to justify the denial of SAF benefits to plaintiffs, nor can defendants demonstrate that the denial of funding is a narrowly drawn means to satisfy any such state interest.

COUNT ONE: VIOLATION OF FREE SPEECH, FREE PRESS AND FREE ASSOCIATION

34. The allegations contained in paragraphs 1 through 33 are incorporated herein by this reference.

35. Although defendants have provided SAF funding to a wide variety of CIOs that engage in religious and

secular expression, defendants have illegally and unconstitutionally denied plaintiffs SAF funding based solely on the content or viewpoint of plaintiffs' speech, communications, identity, activities, and/or membership.

36. Plaintiffs have unjustifiably and unlawfully been denied benefits to which they were and are entitled as Contracted Independent Organizations under the Board of Visitors guidelines as implemented by the Student Council. This loss was the result of state action. This state action violated and continues to violate plaintiffs' rights of free speech, free press and free association under the First Amendment to the United States Constitution and under Article I, Section 12 of the Virginia Constitution. The denial of SAF funds to plaintiffs constitutes impermissible viewpoint and content discrimination. There exists no compelling state interest to justify the defendants' actions. Moreover, whatever interest the state may have in discriminating on the basis of the plaintiffs' viewpoint or the content of their expression can adequately be served by a less restrictive regulation.

37. Defendants' guidelines and definitions for allocating SAF funds to CIOs are unlawfully vague in that persons of common intelligence must necessarily guess at their meaning and differ as to their application, and overbroad in that they reach constitutionally protected activity.

38. By virtue of the unlawful policies and conduct of defendants, plaintiffs have suffered and continue to suffer injury to their rights of free speech, free press and free association, and to the furtherance of their lawful activities.

COUNT TWO: VIOLATION OF FREE EXERCISE OF RELIGION

39. The allegations contained in paragraphs 1 through 38 are incorporated herein by this reference.

40. The Free Exercise Clause of the First Amendment to the United States Constitution, the Free Exercise Clause of Article I, Section 16 of the Virginia Constitution, and

Code of Virginia Title 57, Chapter 1, Sections 57-1 and 57-2 (the Virginia Act for Religious Freedom) prohibit government discrimination in the allocation of benefits or imposition of burdens based upon an individual's or group's religious beliefs, character, or affiliation, or based upon the religious content of their expression.

41. Defendants have impermissibly and unlawfully denied plaintiffs SAF benefits generally available to other students and CIOs. This denial was based upon plaintiffs' religious beliefs, character, affiliation, speech and association.

42. Defendants have not shown and cannot show that denying plaintiffs the SAF funds to which they are lawfully entitled is necessary to serve a compelling state interest, nor can defendants show that such a denial is a narrowly drawn means of achieving that interest.

43. Defendants' conduct deprived and continues to deprive plaintiffs of their right to free exercise of religion as guaranteed under the First and Fourteenth Amendments to the United States Constitution; under Article I, Section 16 of the Virginia Constitution; and under Code of Virginia Title 57, Chapter 1, Sections 57-1 and 57-2 (the Virginia Act for Religious Freedom).

44. Defendants' conduct constitutes a failure to give reasonable accommodation to plaintiffs' religious beliefs.

45. By virtue of the unlawful policies and conduct of defendants, plaintiffs have suffered and continue to suffer injury to their rights of religious freedom and to the furtherance of their lawful activities.

COUNT THREE: VIOLATION OF EQUAL PROTECTION OF THE LAWS

46. The allegations contained in paragraphs 1 through 45 are incorporated herein by this reference.

47. By denying plaintiffs the benefits to which other students and CIOs are entitled, defendants unlawfully and unconstitutionally treat plaintiffs differently from other

similarly situated students and student organizations on the basis of the content or viewpoint of their speech, association, beliefs, character, affiliation, identity and activity.

48. By denying plaintiffs the benefits that other students and CIOs engaging in religious speech and activities receive and have received, defendants unlawfully and unconstitutionally treat defendants differently from other similarly situated students and student organizations on the basis of their religious speech, association, beliefs, character, affiliation, identity and activity.

49. Defendants' conduct under color of state law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Anti-Discrimination Clause of Article I, Section 11 of the Virginia Constitution in that it constitutes discrimination on a suspect basis and violates fundamental constitutional rights. This violation is not justified by a compelling state interest and is not accomplished by narrowly drawn means. Defendants have singled out plaintiffs and denied them SAF benefits based upon the content or viewpoint of their group, their speech, their expression and their association.

50. Plaintiffs have suffered and continue to suffer injury to their rights of equal protection under the law, and to the furtherance of their lawful activities, by virtue of the unlawful policies and conduct of defendants.

COUNT FOUR: VIOLATION OF 42 U.S.C. § 1983

51. The allegations contained in paragraphs 1 through 50 are incorporated herein by this reference.

52. Defendants' denial of plaintiffs' free speech, free press, free association, free exercise of religion and equal protection rights under color of state law violates Chapter 22, Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 (1988).

PETITION FOR RELIEF

53. The allegations contained in paragraphs 1 through 52 are incorporated herein by this reference.

54. Plaintiffs have no plain, speedy and adequate remedy at law.

55. Plaintiffs have exhausted all University of Virginia internal and administrative procedures.

56. Plaintiffs are suffering, and will continue to suffer, irreparable injury for the period of the continued violation of their constitutional rights.

57. WHEREFORE, having stated claims against the defendants under the United States Constitution, the Virginia Constitution, 42 U.S.C. §§ 1983 and 1988, and other applicable law, plaintiffs petition this Court for the following relief:

A. a declaratory judgment that the conduct of the various named defendants in establishing and applying a policy for the University of Virginia, the Rector and Visitors of the University of Virginia, the Student Council of the University of Virginia, and the Appropriations Committee of the Student Council, which refuses to allow the same benefits to plaintiffs as to other similarly situated student organizations (benefits including, but not limited to, eligibility to receive Student Activities Fund ("SAF") funds) and which denies plaintiffs SAF funding solely and expressly because of the content or viewpoint of their speech violates plaintiffs' rights to freedom of speech, freedom of association, freedom of the press, free exercise of religion and to equal protection under the law, as guaranteed by the First and Fourteenth Amendments to the United States Constitution; by Article I, Sections 11, 12 and 16 of the Virginia Constitution; and by the Virginia Act for Religious Freedom, Code of Virginia Title 57, Chapter 1, Sections 57-1 and 57-2;

B. a declaratory judgment that the above-described conduct of the various named defendants denies plaintiffs their civil rights under color of state law in violation of Chapter 22, Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 (1988);

C. a permanent order enjoining defendants from maintaining and applying a policy of discriminating against plaintiffs in the appropriation of Student Activities Fund benefits or in any other manner on the basis of plaintiffs' speech or on the basis of the content or viewpoint of the speech of the Contracted Independent Organization of which plaintiffs are members or of the journals, magazines, newsletters or other things that plaintiffs publish or may publish in the future;

D. such compensatory damages for violation of plaintiffs' federal and state constitutional and statutory rights as the Court may find just and proper, including but not limited to $5,862.00, the sum of the SAF funds unlawfully denied plaintiffs, plus interest thereon from the date of such denial;

E. an order awarding plaintiffs reasonable costs and attorneys' fees pursuant to Section 2 of the Civil Rights Attorney's Fees Award Act of 1976, as amended, 42 U.S.C. § 1988 (1988); and

F. such other relief as the Court deems just and proper.

Dated: Charlottesville, Virginia
July 11, 1991

Respectfully submitted,

/s/ James R. Murray
JAMES R. MURRAY
JACKSON R. SHARMAN III
COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Plaintiffs

/s/ George H. Dygert
GEORGE H. DYGERT (Bar No. 16378)
908 East High Street
Charlottesville, Virginia 22901
(804) 979-5515
Attorneys for Plaintiffs

Of Counsel

MICHAEL P. McDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
6th Floor
Washington, D.C. 20037
(202) 663-9041

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

(Title Omitted in Printing)

ANSWER

Defendants, by counsel, answer the Complaint in this action as follows:

Nature and Summary of the Action

1. Paragraph 1 generally sets forth legal conclusions for which no answer is required.

2. Paragraph 2 generally sets forth legal conclusions in the context of the nature of relief the Plaintiffs seek, and thus no answer is required. It is admitted that the named Plaintiffs are past and present students of the University of Virginia. It is denied that WIDE AWAKE PRODUCTIONS, as well as other Contracted Independent Organizations (CIO), is an organizational unit or component "of" the University of Virginia. With respect to the allegation in Paragraph 2.D. concerning the request for compensatory damages in the amount of $5,862.00, there is no assurance that even if WIDE AWAKE PRODUCTIONS were deemed eligible for student activity funding (SAF) the organization would have received this requested amount in whole or in part. Any remaining factual allegations in Paragraph 2 are denied.

Jurisdiction

3. The allegations in Paragraph 3 set forth legal conclusions for which no answer is required.

Venue

4. The allegations in Paragraph 4 set forth legal conclusions for which no answer is required.

Parties

5. Regarding Paragraph 5, Defendants deny that the WIDE AWAKE magazine is (or was) exclusively or principally "a journal of news, commentary, and opinion", and further state that the editor has stated that the mission of the organization and the magazine it publishes is (and has been) to challenge Christians to live according to their faith and to encourage students to consider what a personal relationship with Jesus Christ means. On information and belief, the remaining factual allegations in Paragraph 5 are admitted.

6. The allegations in Paragraph 6 are admitted. Defendants further state that the student activity fees administered by the Student Council, and allocated to eligible student organizations constitute public or state funds.

7. The allegations in Paragraph 7 are admitted.

General Allegations

8. Regarding Paragraph 8, Defendants deny that the Board of Visitors (directly or through delegated agents) approves the constitution and charters of student organizations or CIOs; nor does the Board "insure" that such organizations adhere to all State and City regulations and statutes. Defendants further state that, in administering and allocating public funds entrusted to the University, the Board of Visitors and its designees are legally obligated to comply with federal and State constitutional and statutory constraints, including the prohibition against financial support or subsidy of sectarian organizations or religious activities. The remaining factual allegations in Paragraph 8 are admitted.

9. The allegations in Paragraph 9 are admitted.

10. The allegations in Paragraph 10 are admitted.

11. The allegations in Paragraph 11 are admitted.

12. Regarding Paragraph 12, only full-time students are charged the student activity fee. The remaining allegations in Paragraph 12 are admitted.

13. The allegations in Paragraph 13 pertaining to the number of CIOs at the University of Virginia, the number or proportion of CIOs that were funded by the Student Council, and the total amount allocated by the Student Council are not accurate. In all other respects, the allegations in Paragraph 13 are admitted.

14. The allegations in Paragraph 14 are admitted.

15. Regarding Paragraph 15, it is admitted that the student organization, Black Voices, was funded for the 1990-91 academic year, but as a cultural—and not a religious—activity. It is further admitted that a representative of Black Voices remarked during the SAF appropriation process that the organization engaged in religious activity, but upon further discussion of the applicable definition of religious activity in the guidelines, the representative expressly stated that the organization is not a religious activity. Furthermore, during the 1990-91 year the Black Voices organization determined that it had shifted from being a cultural activity to a religious activity and consequently resolved not to seek SAF funding for the 1991-92 academic year. It is also admitted that the Muslim Students Association, the Jewish Law Students Association, and the C. S. Lewis Society are organizations that have been funded in the past as cultural—and not religious—activities. The remaining factual allegations in Paragraph 15 are denied.

16. Regarding Paragraph 16, it is admitted that student publications that have received SAF funds in the past have occasionally and incidentally contained opinions or articles that express religious viewpoints. However, unlike WIDE AWAKE magazine whose overt and self-avowed purpose is to provide a pervasively sectarian perspective, such other funded student publications are secular in

nature and any religious viewpoints are invariably incidental parts of their activities. Thus, in this and all other respects the allegations in Paragraph 16 are denied.

17. Regarding Paragraph 17, it is admitted only that certain SAF-funded student organizations express varying ideological viewpoints. The remaining allegations of Paragraph 17 are denied.

18. The allegations in Paragraph 18 are admitted.

19. The allegations in Paragraph 19 are admitted.

20. The allegations in Paragraph 20 are denied.

21. On information and belief, the allegations in Paragraph 21 are admitted.

22. The allegations in Paragraph 22 are admitted.

23. Regarding Paragraph 23, it is admitted only that on or about March 19, 1991, the full Student Council denied WIDE AWAKE's appeal and affirmed the Student Council Appropriations Committee's denial of funding. The remaining factual allegations in Paragraph 23 are denied.

24. The allegations in Paragraph 24 are admitted.

25. The allegations in Paragraph 25 are admitted.

26. Regarding Paragraph 26, it is admitted only that the Student Activities Committee unanimously voted to reaffirm the denial of funding to WIDE AWAKE. The remaining factual allegations in Paragraph 26 are denied.

27. The allegations in Paragraph 27 are admitted.

28. The allegations in Paragraph 28 are denied.

29. The allegations in Paragraph 29 are denied.

30. The allegations in Paragraph 30 are denied.

31. The allegations in Paragraph 31 are denied.

32. The allegations in Paragraph 32 are denied.

33. The allegations in Paragraph 33 are denied.

34. The allegations incorporated in Paragraph 34 are variously admitted or denied as specified in the responses reflected in the preceding paragraphs.

35. Regarding Paragraph 35, Defendants state that only CIOs that are not religious, honorary, philanthropic, social, or political are eligible for SAF funding under the Board of Visitors guidelines. The remaining allegations in Paragraph 35 are denied.

36. The allegations in Paragraph 36 are denied.

37. The allegations in Paragraph 37 are denied.

38. The allegations in Paragraph 38 are denied.

39. The allegations incorporated in Paragraph 39 are variously admitted or denied as specified in the responses reflected in the preceding paragraphs.

40. The allegations in Paragraph 40 set forth legal conclusions for which no answer is required.

41. The allegations in Paragraph 41 are denied.

42. The allegations in Paragraph 42 are denied.

43. The allegations in Paragraph 43 are denied.

44. The allegations in Paragraph 44 are denied.

45. The allegations in Paragraph 45 are denied.

46. The allegations incorporated in Paragraph 46 are variously admitted or denied as specified in the responses reflected in the preceding paragraphs.

47. The allegations in Paragraph 47 are denied. Defendants further state that only CIOs that are not religious, honorary, philanthropic, social, or political are eligible for SAF funding.

48. The allegations in Paragraph 48 are denied. Defendants further state that only CIOs that are not religious, honorary, philanthropic, social, or political are eligible for SAF funding.

49. Regarding Paragraph 49, Defendants state that the University and its agents are prohibited under the United

States and Virginia constitutions from financially funding or subsidizing religious organizations or activities. Defendants further state that as part of its request for SAF funds, the WIDE AWAKE representative admitted that the organization's publication was "a forum for Christian expression" and a means "to challenge Christians (and how) to live . . .". In this and other respects, therefore, the allegations in Paragraph 49 are denied.

50. The allegations in Paragraph 50 are denied.

51. The allegations incorporated in Paragraph 51 are variously admitted or denied as specified in the responses reflected in the preceding paragraphs.

52. The allegations in Paragraph 52 set forth legal conclusions for which no answer is required.

Petition for Relief

53. The allegations incorporated in Paragraph 53 are variously admitted or denied as specified in the responses reflected in the preceding paragraphs of this Answer.

54. The allegations in Paragraph 54 set forth legal conclusions for which no answer is required.

55. The allegations in Paragraph 55 are admitted.

56. The allegations in Paragraph 56 set forth legal conclusions for which no answer is required.

57. The allegations in Paragraph 57 set forth legal conclusions for which no answer is required.

AFFIRMATIVE DEFENSES

As required by Rule 8(c), Fed. Rules Civ. Proc., Defendants assert the following affirmative defenses to the Complaint:

1. Plaintiffs' quest for retroactive monetary relief is barred by the Eleventh Amendment to the United States

Constitution for the reasons set forth in the accompanying Motion to Dismiss.

2. At all times relevant to the matters alleged in the Complaint, Defendants acted in good faith compliance with the existing law and in good faith exercise of their official duties.

Respectfully submitted,

RONALD J. STUMP

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*

By: /s/ James J. Mingle
Counsel

MARY SUE TERRY
Attorney General

JAMES J. MINGLE
Special Assistant Attorney General
and General Counsel
University of Virginia
Post Office Box 9015
Charlottesville, VA 22906-9015
(804) 924-3586

CAROLINE L. LOCKERBY
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Supreme Court Building
Richmond, VA 23219
(804) 786-2421

[Certificate of Service Omitted in Printing]

UNIVERSITY OF VIRGINIA AGREEMENT FOR A CONTRACTED INDEPENDENT ORGANIZATION

THIS AGREEMENT, dated as shown on page 2, paragraph 15 of this Agreement, by and between The Rector and Visitors of the University of Virginia, A Virginia public corporation (the "University"), and the organization shown on page 2, paragraph 15 (the "CIO," for "Contracted Independent Organization");

WITNESS

Various organizations comprised primarily of University of Virginia students, faculty or staff wish the University to provide the organizations with certain benefits. Without necessarily approving or disapproving the goals or activities of particular organizations, the University recognizes that the availability of a wide range of opportunities for its students, faculty and staff tends to enhance the University environment.

The University is thus willing to provide certain benefits to certain organizations (known as "CIO's"), but those benefits should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities.

The University does not use the concept of "recognizing" organizations. They are free to exist and operate either with or without any University benefits. The purpose of this Agreement is to describe the entire relationship between the University and the CIO which is a party to this Agreement, including all of the University benefits the CIO may receive, and all of the conditions for their receipt.

Accordingly, the parties agree as follows:

1. *Representations*

The CIO represents that it is either a non-stock Virginia corporation in good standing with the Virginia State Corporation Commission or an unincorporated association (see page 2, paragraph 15) existing under the laws of Virginia pursuant to the CIO's constitution, a copy of the current version of which, and all future amendments, shall be provided to the University by the CIO (unless the current constitution is already on file with Student Council and the Office of the Dean of Students). The CIO shall also provide the University with a list of all current officers, their addresses and phone numbers, and any changes made to this list.

The person executing this Agreement on the CIO's behalf represents that:

(a) the members of the CIO were provided with a copy of this Agreement as proposed and the membership thereafter authorized such person to execute the Agreement; and

(b) the CIO has consulted with its legal counsel concerning the matters in this Agreement or has had adequate opportunity to do so.

2. *Relationship between the CIO and the University*

The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. The CIO is not an agent, servant or employee of the University, but rather is an independent contractor which manages its own affairs.

The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities, except to the extent, if any, the University chooses to exercise control over activities occurring on its property, or over matters covered by the University's honor or judiciary systems. The parties un-

derstand and agree that the CIO is not required to enter into this Agreement and the only result of the CIO terminating or failing to execute this Agreement will be the loss of the benefits described in this Agreement.

3. *The CIO's Dealings with Third Parties*

The CIO shall not hold itself out as being part of, controlled by, or acting on behalf of the corporation which is the University. The CIO shall take affirmative steps in all of its recruitment, business, and other dealings with third parties (including, for example, prospective members, and businesses) to explain its relationship with the University. As one of such steps, the CIO shall include the following statement (or another similar statement approved in advance by the University) in the CIO's letters, contracts, publications and other such written materials (except intra-university and intraCIO correspondence):

> Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions.

4. *Use of the University's Name and Symbols*

The University does not encourage the use of its name as part of the CIO's name, but it will allow such use provided that, to reinforce the CIO's duties under Section 3 above, the CIO takes whatever steps necessary to prevent persons and organizations with which it deals from receiving the impression that the CIO is part of, controlled by or acting on behalf of the University. The University suggests that one such step is for any use of the University's name as part of the CIO's name to be in the form of "The XYZ Club at the University of Virginia." "The University of Virginia XYZ Club" is not acceptable and cannot be used.

The CIO shall not use any marks, symbols, logos, mottoes or indicia of the University without its express prior written consent.

5. *Taxes*

The CIO shall not use the University's taxpayer identification number or the University's tax-exempt status in connection with purchases or sales by the CIO, gifts to the CIO, interest or other income of the CIO, or any other activity of the CIO.

6. *Liability, Insurance and Defense*

The CIO understands and agrees that the University, the Commonwealth of Virginia, and the employees and agents of either will not be liable for any of the CIO's contracts, torts, or other acts or omissions, or those by the CIO's directors, officers, members, staff or activity participants. The CIO understands and agrees that neither it nor its directors, officers, members, staff, or activity participants are protected by the University's or the Commonwealth of Virginia's insurance policies or self-insurance plans, and that the University and the Commonwealth will not provide any legal defense for the CIO or any such person in the event of any claim against any of them.

7. *Non-discrimination*

The CIO shall not discriminate on the basis of race, color, religion, national origin, handicap, sex, citizenship, sexual orientation, or age when determining its membership. Notwithstanding these requirements, a club sport may restrict membership based on sex where selection for such teams is based upon competitive athletic skill or the activity involved is a contact sport. Organizations may also make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex. A fraternity or sorority as defined in

Attachment B may discriminate on the basis of sex. In determining cases of the discrimination it is not sufficient to look merely to the constitution of the CIO. Its actual practices and operations are also relevant.

8. *Funding*

To be eligible to receive any funds from the student activities fee collected and administered by the University and Student Council, the CIO must comply with the provisions adopted by the Board of Visitors and Student Council. If the CIO receives any funding, it shall comply with the provisions adopted by the President, the Student Activities Committee, and Student Council pursuant to the powers delegated to them.

9. *Use of Facilities*

The University hereby makes the CIO eligible for use of the University's facilities, subject to the policies and procedures of the University and Student Council applicable to such facilities. If space in Newcomb/Peabody is assigned to the CIO, the description of such space and any special conditions applicable to its use shall be maintained by Student Council and/or the University.

10. *"Fraternity" or "Sorority"*

If the CIO is a "Fraternity" or "Sorority" as defined in Attachment B, it shall also comply with the provisions of that attachment as a part of this Agreement.

11. *Club Sports*

If the CIO is a "Club Sport" as defined in Attachment A, it shall also receive the benefits enumerated in that attachment and abide by the provisions of that attachment as a part of this Agreement.

12. *Term of Agreement*

This Agreement shall become effective as of the date written below and shall terminate on the last day of class of the academic year unless terminated earlier by the CIO, with or without cause, by written notice to the University, or by the University as a result of any violation of this Agreement by the CIO. The University Judiciary Committee may likewise recommend the termination of this Agreement for violations of the University's Standards of Conduct. Further, the University reserves the right to suspend or terminate this Agreement for cause.

13. *Waiver*

Failure of the University to enforce any of the provisions of this Agreement shall not be construed as a waiver of that provision or any later breach thereof.

14. *Notices*

Any notice under this Agreement shall be deemed given when deposited in the mail, postage prepaid, and addressed as follows:

If to the CIO: (please print or type)

WIDE AWAKE
c/o R.W. Rosenberger
P.O. Box 607
Newcomb Hall
Charlottesville, VA 22904

If to the University:

Office of the Dean of Students
P.O. Box 708, Newcomb Hall Station, U.Va.
Charlottesville, Virginia 22904

or to such other persons, at such addresses, as either party may designate for itself and so notify the other party in writing.

15. *Entire Agreement; Amendments*

This Agreement constitutes the entire agreement between the CIO and the University concerning this subject matter, and it supersedes all prior written or oral agreements concerning this subject matter. This Agreement may not be amended except by written document executed by both parties.

IN WITNESS THEREOF, the parties have executed this Agreement below:

NAME OF CIO: WIDE AWAKE

Check one: — a non-stock Virginia Corporation
X an unincorporated association

By Ronald W. Rosenberger
(Authorized Organization Officer's
(Printed Name)

/s/ R. W. Rosenberger
(Authorized Organization Officer's
Signature)

Title: Editor-in-Chief

Date: 4/24/91

THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA

By /s/ Ronald J. Stump
(University Authorized Officer)

Title: Associate Dean of Students

Date: 5-2-91
(Effective Date of Contract)

Reviewed by Student Council: /s/ Mike Marcellin
(Authorized Officer of Student Council)

PLEASE ATTACH ORGANIZATION'S CONSTITUTION AND LIST OF OFFICERS; AND RETURN *ALL* COPIES OF THIS FORM

University of Virginia CIO Agreement, Document #1, 04/18/91

White—Organization (CIO)

Canary—Student Council

Pink—Office of the Dean of Students

Goldenrod—Governing Group

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

(Title Omitted in Printing)

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

* * * *

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiffs set forth below their statement of material facts as to which there is no genuine issue in support of their Motion for Summary Judgment.

1. Plaintiff RONALD W. ROSENBERGER, a student at the University of Virginia, is presently a resident of the Commonwealth of Virginia and was a resident of the Commonwealth of Virginia at all times relevant herein. The unincorporated organization of which he is a member, plaintiff WIDE AWAKE PRODUCTIONS, is and was at all times relevant herein a Contracted Independent Organization ("CIO") at the University of Virginia, with its principal operations in the County of Albemarle, Commonwealth of Virginia. The publication of which he is Publisher, plaintiff WIDE AWAKE MAGAZINE, is and was at all times relevant herein published and distributed by plaintiff WIDE AWAKE PRODUCTIONS at the University of Virginia in the County of Albemarle, Commonwealth of Virginia. Plaintiff ROBERT J. PRINCE is a student at the University of Virginia and the Managing Editor of WIDE AWAKE MAGAZINE. Plaintiff GREGORY W. MOURAD is a student at the University of Virginia and Editor-in-Chief of WIDE AWAKE MAGAZINE. Plaintiffs ROBERT J. PRINCE and GREGORY W. MOURAD are and/or at all times relevant herein were residents of or located in the County of Albemarle, Commonwealth of Virginia. (Complaint ¶ 5; Answer ¶ 5; Affidavit of Ronald W. Rosenberger, Editor-in-Chief of *Wide Awake* magazine ("Rosenberger Aff.") ¶¶ 1-2).[1]

2. Defendants EDWARD E. ELSON, W.L. LYONS BROWN, JR., ROBERT G. BUTCHER, JR., N. THOMAS CONNALLY, M.D., HOVEY S. DABNEY, WALLER H. HORSLEY, J. THOMAS HULVEY, M.D., EVANS B. JESSEE, PATRICIA M. KLUGE, ARNOLD H. LEON, LEIGH B. MIDDLEDITCH, JR., ELIZABETH D. MORIE, FREDDIE W. NICHOLAS, SR., S. BUFORD SCOTT, JESSE B. WILSON, III, THOMAS E. WORRELL, JR., ADAM S. ARTHUR, and ALEXANDER G. GILLIAM, JR. are sued in their capacities as members of defendant RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA ("Board of Visitors"). The Board of Visitors of the University of Virginia is a corporation established by the General Assembly of the Commonwealth of Virginia. The Board of Visitors is subject to the control of the General Assembly of the Commonwealth of Virginia. The members of the Board of Visitors are appointed by the Governor of Virginia. The Board of Visitors, in accordance with the Constitution of the Commonwealth of Virginia and with law, formulates policy, makes regulations and exercises such control over the University of Virginia as it deems expedient. The Board of Visitors may lawfully delegate this power. Under authority of the General Assembly, the Board of Visitors has exclusive jurisdiction over the internal organization, government and management of the University of Virginia. The University of Virginia is an institution of higher education that receives public funds from the Commonwealth of Virginia. The monies

---

[1] Unless otherwise specified, plaintiffs are hereafter referred to collectively as "Wide Awake."

in the Students Activities Fund ("SAF") constitute public funds. (Complaint ¶ 6; Answer ¶ 6).

3. Defendant RONALD J. STUMP is and was at all times relevant herein Associate Dean of Students at the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia. Defendant RONALD J. STUMP is and/or was at all times relevant herein the Associate Dean of Students at the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia. The Student Activities Committee is a University of Virginia committee composed of faculty members, administrators and students. The Student Activities Committee is charged by the Vice President for Student Affairs of the University of Virginia to provide oversight of the student activities fee fund and its allocation by the Student Council. (Complaint ¶ 7; Answer ¶ 7).

4. As provided for in the Code of Virginia Title 23, Chapter 9, Article 2, Sections 23-69 to 23-80, the Board of Visitors is charged with the authority to manage the affairs of the University of Virginia. One of its responsibilities is the general oversight of student activities. To this end, the Board of Visitors has adopted policies with regard to the operation and funding of student organizations. Such policies include the requirement that the Board of Visitors (or its delegate) establish guidelines for the funding of such organizations from Student Activities Fund ("SAF") monies. (Complaint ¶ 8; Answer ¶ 8).

5. The Student Council of the University of Virginia is a Special Status Student Organization that conducts its affairs pursuant to a delegation of authority from the Board of Visitors. Currently and at all times relevant herein, the Board of Visitors sets forth and has set forth the guidelines and procedures for the distribution of SAF funds to Contracted Independent Organizations. Currently and at all times relevant herein, the Student Council implements and has implemented these guidelines and procedures. (Complaint ¶ 9; Answer ¶ 9).

6. The Student Council has a number of subcommittees, including an Appropriations Committee. The Appropriations Committee is chaired by the Student Council's Vice-President for Student Organizations. (Complaint ¶ 10; Answer ¶ 10).

7. During the period relevant to this lawsuit, the Student Council, upon recommendation of its Appropriations Committee, has regularly funded CIOs from SAF funds. This practice dates back at least to 1973. (Complaint ¶ 11; Answer ¶ 11).

8. The University of Virginia has charged at all times relevant herein and currently charges each full-time student a compulsory student activity fee of $14.00 per semester. There is no procedural or other mechanism by which a student may decline to pay the fee. These compulsory student fees are deposited into the University of Virginia Student Activities Fund. (Complaint ¶ 12; Answer ¶ 12).

9. There are more than 300 CIOs at the University of Virginia. Approximately 100 CIOs were funded with SAF monies during the 1990-1991 academic year under criteria and guidelines established by the Board of Visitors. Acting pursuant to its authority from the Board of Visitors, the Student Council allocated more than $200,000.00 to CIOs for that time period. (Complaint ¶ 13; Answer ¶ 13).

10. The Board of Visitors guidelines that are applied by the Student Council prohibit the funding of, *inter alia*, "religious activities" with SAF monies. (Complaint ¶ 14; Answer ¶ 14).

11. The student organization Black Voices was funded with SAF monies for the 1990-91 academic year. During the SAF appropriations process, the representative of

Black Voices stated that the organization engaged in religious activity. Subsequently during the SAF appropriations process, the representative of Black Voices stated that the organization did not engage in religious activity. Prior to the SAF appropriations process for the 1991-92 academic year, defendant RONALD J. STUMP informed the Black Voices organization that the organization could either forego engaging in "religious activity" or forego receipt of SAF benefits. Black Voices subsequently resolved not to seek SAF benefits for the 1991-92 academic year. (Complaint ¶ 15; Answer ¶ 15).

12. The Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society have received in the past and continue to receive SAF benefits. (Complaint ¶ 15; Answer ¶ 15).

13. Student publications that have received SAF benefits in the past have contained opinions or articles that express both religious and secular viewpoints. (Complaint ¶ 16; Answer ¶ 16).

14. *Wide Awake* magazine contains both religious and secular subject matter. (Rosenberger Aff. ¶ 3).

15. *Wide Awake* magazine generally expresses a religious perspective. (Answer ¶ 16; Rosenberger Aff. ¶ 4).

16. SAF-funded student organizations express a variety of ideological viewpoints, including but not limited to viewpoints which are inconsistent with or antagonistic to various religious beliefs. (Complaint ¶ 17; Answer ¶ 17).

17. In January of 1991, Plaintiff RONALD W. ROSENBERGER, on behalf of plaintiffs WIDE AWAKE PRODUCTIONS and WIDE AWAKE MAGAZINE, submitted an application for Student Activities Fund benefits to the Student Council Appropriations Committee. This application for funding was in the amount of $5,862.00

to support the publication of *Wide Awake* magazine. (Complaint ¶ 18; Answer ¶ 18).

18. On or about February 26, 1991 the Student Council Appropriations Committee turned down plaintiffs' request for Student Activities Fund funding. A February 26, 1991 letter from the Student Council's Vice President for Student Organizations to plaintiff RONALD W. ROSENBERGER stated that the reason for the denial of funding was that the Student Council Appropriations Committee had "determined your organization's request could not be funded as it is a religious activity. The determination was made after reviewing your first issue of *Wide Awake*." (Complaint ¶ 19; Answer ¶ 19).

19. No reason other than the alleged status of Wide Awake as a "religious activity" was offered as a basis for the denial of funding. (Complaint ¶ 20; Complaint ¶ 20 [sic]; Rosenberger Aff. ¶ 5).

20. The application of Wide Awake for Student Activities Fund benefits conformed with all applicable, content-neutral Student Activities Fund requirements. In particular, at least 51% of Wide Awake's members are students; the organization's officers are all full-time, fee-paying students; the group keeps an updated copy of its constitution on file at the University of Virginia Student Council offices; and Wide Awake has signed all anti-discrimination disclaimers that are required. (Complaint ¶ 21; Answer ¶ 21; Rosenberger Aff. ¶ 8).

21. Pursuant to procedures established by the Board of Visitors and implemented by the Student Council, Wide Awake appealed the Student Council Appropriations Committee's denial of funding to the full Student Council on or about March 3, 1991. (Complaint ¶ 22; Answer ¶ 22).

22. On or about March 19, 1991, the full Student Council denied Wide Awake's appeal and affirmed the

Student Council Appropriations Committee's denial of funding. (Complaint ¶ 23; Answer ¶ 23).

23. The Student Council stated no reasons for the denial of benefits to Wide Awake other than its alleged status as a "religious activity." (Complaint ¶ 23; Answer ¶ 23; Rosenberger Aff. ¶ 5).

24. Pursuant to Board of Visitors and Student Council procedures, Wide Awake appealed the decision of the Student Council to the Student Activities Committee. (Complaint ¶ 24; Answer ¶ 24).

25. On or about April 8, 1991 the Student Activities Committee held a public hearing on the Wide Awake appeal. (Complaint ¶ 25; Answer ¶ 25).

26. On or about April 15, 1991 the Student Activities Committee voted to affirm the denial of funding to Wide Awake. (Complaint ¶ 26; Answer ¶ 26).

27. The Student Activities Committee stated no reasons for the denial of benefits to Wide Awake other than its alleged status as a "religious activity." (Complaint ¶ 26; Answer ¶ 26; Rosenberger Aff. ¶ 5).

28. Wide Awake has exhausted all internal and administrative procedures provided by the University of Virginia. (Complaint ¶ 27; Answer ¶ 27).

29. Because plaintiffs have been denied SAF benefits, they are ineligible to apply for access to certain space and facilities at the University of Virginia, including but not limited to computers, printers and other equipment located in Peabody Hall at the University of Virginia. (Complaint ¶ 29; Answer ¶ 29; Rosenberger Aff. ¶ 6).

30. The facilities in Peabody Hall containing computers, printers and other equipment are available for use and have been available for use at all times relevant herein by SAF-funded Contracted Independent Organizations that produce publications and pay a nominal annual

fee for the use of such facilities. (Complaint ¶ 30; Answer ¶ 30; Rosenberger Aff. ¶ 7).

Dated: Charlottesville, Virginia

November 11, 1991

Respectfully submitted,

/s/ James R. Murray
JAMES R. MURRAY
JACKSON R. SHARMAN III
COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

/s/ George H. Dygert
GEORGE H. DYGERT
(Bar No. 16378)
GEORGE H. DYGERT & ASSOCIATES
900 E. High Street
Charlottesville, VA 22701
(804) 979-5515
Attorneys for Plaintiffs

Of Counsel

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF RONALD W. ROSENBERGER

I, Ronald W. Rosenberger, state as follows:

1. I, Ronald W. Rosenberger, am a student at the University of Virginia and a resident of the Commonwealth of Virginia, and I was a resident of the Commonwealth of Virginia at all times relevant herein.

2. I am the Publisher of *Wide Awake* magazine, a non-profit journal that is written, edited, published and distributed at the University of Virginia by students at the University of Virginia (hereafter collectively "Wide Awake," unless otherwise noted). Gregory W. Mourad is a student at the University of Virginia and Editor-in-Chief of *Wide Awake* magazine. Robert J. Prince is a student at the University of Virginia and Managing Editor of *Wide Awake* magazine.

3. *Wide Awake* magazine contains both religious and secular subject matters.

4. *Wide Awake* magazine generally expresses a religious perspective.

5. At no time in the 1990-91 Student Activities Fund ("SAF") appropriations process did the University of Virginia Student Council Appropriations Committee ("Appropriations Committee"); the University of Virginia Student Council ("Student Council"); the University of Virginia Student Activities Committee ("Student Activities Committee"); or the Rector and Visitors of the University of Virginia ("Board of Visitors" or "BOV"), or any of their officers, members or agents inform Wide Awake that Wide Awake was denied SAF benefits for a reason other than the allegation that publication of *Wide Awake* magazine constitutes a prohibited "religious activity" under the relevant Board of Visitors Guidelines.

6. Because Wide Awake has been denied SAF benefits, Wide Awake is ineligible to apply for access to certain space and facilities at the University of Virginia, including but not limited to computers, printers and other equipment located in Peabody Hall at the University of Virginia.

7. The facilities in Peabody Hall containing computers, printers and other equipment are available for use and have been available for use at all times relevant herein by SAF-funded contracted independent organizations ("CIOs") that produce publications and pay a nominal annual fee for the use of such facilities.

8. Wide Awake is composed of at least 51% students; Wide Awake's officers are all full-time, fee-paying students; Wide Awake keeps an updated copy of its constitution on file at the student council offices, and Wide Awake has signed antidiscrimination disclaimers. Throughout the appropriations process, none of the entities or individuals listed in Paragraph 5 above informed Wide Awake that Wide Awake did not apply with all applicable, content-neutral requirements for the receipt of SAF benefits.

9. Because Wide Awake was denied and continues to be denied SAF benefits, the writers, editors and publishers of Wide Awake Magazine spend time raising funds for the publication that they would otherwise spend at their writing, editing and publishing tasks.

10. At no point in the SAF appropriations process did the Appropriations Committee, the Student Council, the

Student Activities Committee or the Board of Visitors maintain that the religious beliefs of the writers, editors and publishers of Wide Awake Magazine were not or are not sincerely held.

11. Throughout the appropriations process, Wide Awake received no communications from the Board of Visitors, nor was Wide Awake at any point informed that the Board of Visitors had considered or was considering the constitutional issues involved in Wide Awake's application for SAF benefits.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 8th day of November, 1991 in Charlottesville, Virginia.

/s/ Ronald W. Rosenberger
RONALD W. ROSENBERGER

Given under my hand and seal this
8th day of November, 1991.

/s/ Kelly A. Hobbs
Notary Public

My Commission expires: 2/28/95

EXHIBIT 1

LETTER FROM THE EDITOR

Welcome!

Dear Readers, Welcome to the first issue of *Wide Awake*. *Wide Awake* offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia. Last Spring we realized that none of the fifteen student-run publications at the University provided a forum for Christian expression, and we decided to fill that void.

Our mission is twofold: to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means. College is a time to pursue knowledge; an understanding of one's religious beliefs should not be neglected, but should rather constitute the heart of that quest.

Christianity is not a spectator sport—it is a vital relationship with our Creator, the One who knows us intimately and loves us infinitely. Jesus calls us to be active players in life. In Matthew 5:13-14, Jesus says "You are the salt of the earth. . . . You are the light of the world. A city on a hill cannot be hidden." Christians are called to lead exemplary lives by walking in Jesus's footsteps.

In this issue, we will explore how Christian principles for living can have an impact on our personal lives, our attitudes towards others, and our relationship to people in need. Economics professor Ken Elzinga shares how Christ has influenced his role as a teacher. In our cover story, we examine how the Bible offers tenable solutions

to racism, a disease that has plagued society for centuries. Finally, we look at a Christian home for unwed mothers as a concrete example of Christian love in action.

We hope that the articles in this issue will inspire you to consider how the Bible applies to your own life today. We would like to extend a special thanks to the Center for Christian Study for the use of their office and the encouragement they gave us. We would also like to thank those who made this magazine possible through their prayers and financial support.

Love in Christ,

/s/ Ronald W. Rosenberger
RONALD W. ROSENBERGER
Editor-in-Chief

Interested in graphics, writing, or editing?

Spread the Good News!
Join
WIDE AWAKE!

For more information call Ron at 979-5844.

WIDE AWAKE

A Christian Perspective at the University of Virginia

The hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed.

—Romans 13:11

Editor-in-Chief
Ronald W. Rosenberger

Executive Editor
Greg Mourad

Managing Editor
Rob Prince

Contributors
Stephanie Ace
Karen Barnes
Jeff Buterbaugh
Michelle Carpick
Jason Craddock
Crystal M. Dobson

Rod Early
Alice Ferguson
Traci Gallagher
Lisa Hampson
Fred Hopkins
Robin Kim
Jenny Lea Foley
Kenneth Liu
Vivian Macpherson
Kimberly Manno
Marcus Meachum
Christy Olson
Nikki Poitevent
Mike Snyder
Heather Winter

Special thanks to the Center for Christian Study.

Send correspondence to:

P.O. Box 607
Newcomb Hall Station
Charlottesville, VA 22904

The opinions expressed in signed articles are the opinions of the authors and do not necessarily represent those of Wide Awake Productions.

EXHIBIT 2

APPROPRIATION'S COMMITTEE RECOMMENDATIONS SPRING 1991 PROCESS

Category 1 Special Status Student Organizations Charged By The Board Of Visitors

	Request	Allocation	
Student Council			Decided 4/91
WTJU	25925	17104	
Total	25925	17104	

Category 2 Co-Curricular Organizations Which Are Not Administered By University Departments Or Units

	Request	Allocation	
AIESEC	2954	944	
Classics Graduate Assoc.	552	252	
Darden Entrepreneurs Club	748	90	
Darden Health Care Forum	868	254	
Darden Marketing Club	2384	1088	
Environmental Sciences Org.	130	116	
Graduate Biosciences Society	4066	556	
Grad. Society Of Black Engineers	914	448	
International Business Society	1374	0	Self-Sufficient
Int. Relations Organization	2852	1854	
Nat. Society Of Black Engineers	1028	0	Self-Sufficient
Operations Club	398	0	Self-Sufficient
Philosophy Club	614	144	
Pre-Physical Therapy Club	430	330	
Pre-Veterinary Society	1998	1202	
Reserve Officers Assoc. Of Darden	748	326	
Rhetoric & Com. Studies Society	696	252	
Soc. Of Hispanic Prof. Engineers	826	294	
Society Of Arch. History	1728	878	
Student Alliance Of Landscape Arch.	1099	280	
Student Nurses Assoc. At UVA	2476	438	
Virginia AIAS	1234	430	
Washington Lit. Society	1348	364	
Total	31465	10540	

Category 3 Club Sports

	Request	Allocation	
Cavalier Road Runners	1512	1250	
Club Sport Council	1314	1314	
Fencing Club (Virginia)	3404	2700	
Floor Hockey Club (Virginia)	776	556	
LaCrosse Club (Virginia)	1146	1146	
Mountain Biking Club	670	578	
Okinawan Kempo Karate Club	3300	1912	
Polo Club (Virginia)	9788	8990	
Raquetball Club	610	360	
Riding Team (Virginia)	5434	4534	
Rifle & Pistol Club (Virginia)	6608	6002	
Rowing Team	18458	10134	
Rugby, Men's	14388	9568	
Rugby, Women's	4102	3936	
Shotokan Karate	522	414	
Ultimate Club	5044	3646	
Virginia Ski Team	9692	5632	
Virginia Soccer Club	2034	2034	
Volleyball	2970	2710	
Water Polo	2140	1602	
Women's Soccer Club	1500	1412	
Total	95412	70430	

Category 4 Student News, Information, Opinion, Entertainment, Or Academic Communications Media Groups

	Request	Allocation	
Audio Visuals Unlimited	9570	6512	
Cavalier Communications/Wire			Deferred
Coup	714	714	
Declaration, The			Deferred
Dialogue Magazine	6818	5426	
Journal Of Law & Politics	3392	3392	
Loki Science Magazine			Defunded
Oculus	4748	4748	
Seasons	0	0	Self-Sufficient
Thoughtlines	2580	2580	
University Journal	9028	8538	
Virginia Advocate	2553	2470	
Virginia Env. Law Journal	2656	2330	
Virginia Journal Of Int. Law	8726	6454	
Virginia Literary Review	3353	3346	
Virginia Studio Record	1506	620	
Virginia Tax Review	1482	1282	
Wide Awake Productions			Defunded
Yellow Journal	3386	3050	
Total	60512	51462	

Category 5 Cultural Organizations

	Request	Allocation	
Afri-Carib Association	1246	712	
Asian Student Union	1372	866	
Black Student Alliance	0	0	Self-Sufficient
Chinese Student Association	892	880	
Hellenic Association/Society	50	50	
Indian Student Association	1098	822	
Japanese Club	430	412	
Muslim Students' Association	444	246	
Org. Of Young Filipino Americans	948	756	
Pakistan Student League	460	372	
Society For The Promotion Of Indian Class. Music	2372	2044	
Vietnamese Student Assoc.	468	280	
Total	9780	7390	

Category 6 Fine Arts Organizations

	Request	Allocation	
Camerata Rotunda			Deferred
Musique	634	24	
Pep Band	9198	6540	
Shalom Theatre Co.	0	0	Self-Sufficient
Virginia Glee Club	10980	8440	
Virginia Sil'Hooettes	1224	486	
Total	22036	15490	

Category 7 Madison House:

	Request	Allocation
Madison House	33188	33188
Total	33188	33188

Category 8 Hobby Organizations:

	Request	Allocation	
Amateur Radio Club	2162	0	Self-Sufficient
C.S. Lewis Society	280	220	
Dance Club	324	312	
Karate & Self Defense	1012	682	
Outing Club At UVA	2080	840	
Virginia Ski Club	173	0	Self-Sufficient
Total	6031	2054	

Category 9 Non-Political Groups Whose Predominate Purpose Is To Present Speakers On Topics Of Probable General Interest To The University

	Request	Allocation
Alternatives: Perspectives In Medicine	1676	1050
Black Law Students Assoc.	5612	3564
Environmental Law Forum	852	764
Darden Business Club	2162	968
Federalist Society	3204	1444
Moore, J.B., Society Of Int. Law	2360	1016
Shotokan Karate Club	522	414
Speakeasy	336	266
Sports & Entertainment Law Forum	852	20
Student Legal Forum	7636	5548
Virginia Law Women	1122	843
Total	26334	15897

Category 10 The Student Legal Services

	Request	Allocation
Student Legal Services	66000	65346
Total	66000	65346

Category 11 Service Organizations

	Request	Allocation	
Action For Better Living	1614	1496	
Amnesty International At UVA	0	0	Self-Sufficient
Blue Ridge Mtn. Rescue Group	7574	6916	
Cavalier Civitan Club	788	472	
Circle K	866	0	Self-Sufficient
Council Of Black Student Leaders	3206	2420	
Darden Environmental Alliance	758	660	
Gay & Lesbian Law Student Assoc.	476	460	
Legal Assistance Society	3176	2724	
Lesbian & Gay Student Union	2084	1862	
The Monroe Society			Deferred
Post Conviction Assistance Project	7060	5740	
Students Against Hunger	1838	846	
Students For Animal Rights	522	200	
Student Alliance For Va. Environment			Deferred
Students For Rape Awareness	698	558	
Student Watch	1318	968	
Teach For America Of UVA	508	360	
Total	32486	25682	
	Total	314583	

EXHIBIT 5

[Univ. Logo]

STUDENT COUNCIL
UNIVERSITY OF VIRGINIA
P O Box 707 Newcomb Hall Station
Charlottesville, Virginia 22904

108 Peabody Hall
(804) 921-3151
(804) 982-HEAR

February 26, 1991

Mr. Ronald W. Rosenberger
Chief Executive Officer
Wide Awake Productions
1904 Jefferson Park Avenue # 22
Charlottesville, VA 22903

Dear Ron:

This letter is intended to formally notify you of the Appropriations Committee's decision to not fund Wide Awake Productions for 1991-92.

The Student Council Appropriations Committee is responsible for allocating funds to student organizations within the Board of Visitors Guidelines. These Board of Visitors Guidelines designate specific student organizations and activities which may or may not be funded. The Board of Visitors have determined that such student groups as fraternities, sororities, honor societies and religious organizations and such activities as social entertainment, political activities and religious activities may not be funded by the Student Activity Fee. As you know, other student organizations and activities such as fine arts, sports clubs, hobby organizations may be funded by the fee. These distinctions have been made in order to fund

those activities felt to be most related to the educational purpose of the University because of the limited amount of money available in the fund.

In reviewing the request by Wide Awake Productions, the Appropriations Committee determined your organization's request could not be funded as it is a religious activity. This determination was made after reviewing your first issue of *Wide Awake*. In particular, the committee noted in your Editor's Letter that the publication was "a forum for Christian expression" and a means "to challenge Christians (in how) to live . . . ." The committee's decision was supported by the opinion of the University's General Counsel who also reviewed the publication.

Please be aware that this decision simply denies Student Activity Fee funding for your publication. Wide Awake Productions may still print and distribute issues on Grounds. For this reason, we wish you every success with your efforts. As a reminder, the Appropriations Committee's decision may be appealed to Student Council if you submit a written appeal by 5:00 p.m., Sunday March 3 at the Student Council office. You have until 5:00 p.m., Friday, March 1, to submit an appeal for a hearing at the March 5 Student Council meeting.

If you have any questions about this matter, please feel free to contact me.

Sincerely,

/s/ Cynthia J. Wilbricht
CYNTHIA J. WILBRICHT
Vice President
for Student Organizations

CJW:bc

c: Ronald J. Stump
Student Council Appropriations Committee

EXHIBIT 7

[Univ. Logo]

UNIVERSITY OF VIRGINIA
Office of the Dean of Students

Peabody Hall
Tel. 804-924-7133

April 16, 1991

Mr. Ronald W. Rosenberger
Chief Executive Officer
Wide Awake Productions
P.O. Box 607
Newcomb Hall Station

Dear Ron:

This letter is intended to formally notify you of the Student Activities Committee's decision to deny the appeal by Wide Awake Productions.

After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake Productions and by Student Council, the committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from Ms. Cyndi Wilbricht. As noted in Ms. Wilbricht's letter, Wide Awake Productions may still print and distribute copies of the magazine and as a CIO has full and equal access to other University facilities and services.

On behalf of the Student Activities Committee, I extend our best wishes for a successful publication. If you have any questions regarding the committee's decision, please feel free to contact me.

Sincerely,

/s/ Ronald J. Stump
RONALD J. STUMP
Associate Dean of Students

RJS:bc

c: Student Activities Committee
James J. Mingle

EXHIBIT 11

1988-89 STUDENT ACTIVITY FUND ALLOCATIONS

Group	Request	Alloc.	3% Cut	Final Allocation	
Club Sports Council	3,046	2,934	88	2,846	1,423
Council of Black Student Leaders	3,741	1,804	54	1,750	875
					ERR
TOTAL	$6,787	$4,738	$142	4,596	2,298
AISEC	2,807	Deferred	Deferred	Deferred	ERR
Anthropology Assoc.	621	602	18	584	292
Asian Studies Committee	177	168	5	164	82
Black Architecture Student Assoc.	0	0	0	0	0
Black Engineering Society	902	726	22	704	352
Daniel Hale Williams Black Pre-m	170	0	0	0	0
Doctoral Nursing Students Org.	778	634	19	616	308
Entrpreneurs [sic] Club	792	0	0	0	0
Environmental Sciences Org.	542	426	13	414	207
Gandhi Peace Center	1,047	240	7	232	116
Graduate History Students Assoc.	404	0	0	0	0
Graduate Society of Black Engine	3,731	Defunded	Defunded	Defunded	ERR
Grad. Student Assoc., Govmt. Dep	3,426	0	0	0	0
McIntire Marketing Assoc.	2,875	1,838	55	1,784	892
NSSLHA	473	274	8	266	133
Phi Beta Lambda	578	42	1	42	21
Philosophy Club	981	526	16	512	256
Pre-Veterinary Society	738	366	11	356	178
Rhetoric and Communications Society	485	446	13	434	217

Group		Request	Alloc.	3% Cut	Final Allocation	
Society of Women Engineers		547	524	16	510	255
Student Medical Society		1,711	1,512	45	1,468	734
Student Planners Assoc.		3,124	2,264	68	2,198	1,099
T & D Society		1,961	76	2	74	37
						ERR
	TOTAL	$26,906	$10,664	$320	$10,358	5,179
Archery Club		1,695	746	22	724	362
Cavalier Road Runner Club		1,322	734	22	712	356
Croquet Club		2,170	986	30	958	479
Cycling Club		836	636	19	618	309
Dance Club		969	824	25	800	400
Fencing Club		4,659	2,876	86	2,790	1,395
Floor Hockey Club		1,012	332	10	324	162
Gymnastics Club		1,852	1,306	39	1,268	634
Judo Club		1,530	770	23	748	374
Kendo and Iai Club		3,938	1,710	51	1,660	830
Myo Sim Karate Club		1,726	70	2	68	34
Okinawan Kempo Karate		13,065	2,486	75	2,412	1,206
Polo Club		8,368	3,930	118	3,814	1,907
Riding Team		7,684	2,620	79	2,542	1,271
Rifle and Pistol Club		5,413	2,424	73	2,352	1,176
Rowing Assoc.		34,587	8,150	245	7,906	3,953
Rugby Football Club, Men's		10,142	4,190	126	4,066	2,033
Rugby Football Club, Women's		4,762	4,322	130	4,194	2,097
Sailing Association		2,465	1,584	48	1,538	769

Shotokan Karate Club		1,694	654	20	636	318
Soccer Club		2,214	1,802	54	1,748	874
Uechi Ryu Karate Club		1,792	660	20	642	321
Ultimate Frisbee Club		4,135	3,060	92	2,870	1,435
Volleyball Club		1,462	1,042	31	1,012	506
Water Polo Club		2,524	1,432	43	1,390	695
						ERR
	TOTAL	$122,013	$49,346	$1,480	$47,792	23,896
Declaration		15,389	13,138	394	12,744	6,372
Dialogue		14,000	4,490	135	4,356	2,178
Forum, The		1,275	Defunded	Defunded	Defunded	ERR
Four A.M. Writer's Guild		1,068	Defunded	Defunded	Defunded	ERR
Iris		14,078	Defunded	Defunded	Defunded	ERR
Journal of Law and Politics		8,120	8,070	242	7,828	3,914
Loki Science Magazine		4,989	2,164	65	2,100	1,050
Modulus		5,386	5,312	159	5,154	2,577
Oculus		5,315	3,400	102	3,298	1,649
Seasons		6,482	5,382	161	5,222	2,611
Thoughtlines		7,444	3,750	113	3,628	1,814
University Journal		40,884	33,918	1,018	32,902	16,451
Va. Journal of International Law		11,803	10,394	312	10,084	5,042
Va. Journal of Nat. Resources Law		0	0	0	0	0
Virginia Advocate		10,445	3,800	114	3,686	1,843
Virginia Literary Review		2,670	1,062	32	1,032	516
Virginia Studio Record		5,243	4,902	147	4,756	2,378
Virginia Tax Review Assoc.		8,639	3,784	114	3,672	1,836
Yellow Journal		6,429	3,998	120	3,880	1,940
						ERR
	TOTAL	$169,657	$107,564	$3,227	$104,342	52,171

Group		Request	Alloc.	3% Cut	Final Allocation	
Audio Visuals Unlimited		36,372	5,170	155	5,016	2,508
TJU-FM		11,475	1,062	32	1,032	516
						ERR
	TOTAL	$47,847	$6,232	$187	$6,048	3,024
Camerata Rotunda		3,855	1,982	59	1,924	962
Chinese Student Assoc.		896	754	23	732	366
Committee on Asian Cultures		1,442	776	23	754	377
Glee Club		213	0	0	0	0
Indian Student Assoc.		1,817	644	19	626	313
Interculture		540	162	5	158	79
Iranian Students Assoc.		1,256	716	21	696	348
Japanese Club		645	606	18	588	294
Jazz Ensemble		2,042	0	0	0	0
Musique		1,385	94	3	92	46
Pep Band		10,912	4,526	136	4,392	2,196
Scandinavian Interest Club		396	206	6	200	100
Senior Cassical [sic] League		1,370	938	28	910	455
Spanish House		582	Defunded	Defunded	Defunded	ERR
Symphonic Band		3,293	804	24	780	390
University Singers		716	418	13	406	203
Vietnamese Students Assoc.		640	198	6	194	97
Virginia Hullabahoos		1,663	762	23	740	370
Women's Chorus		6,430	3,464	104	3,362	1,681
						ERR
	TOTAL	$40,091	$17,050	$512	$16,554	8,277

Madison House		30,506	29,020	871	28,150	14,075
						ERR
	TOTAL	$30,506	$29,020	$871	$28,150	14,075
Post Conviction Assistance Project		3,931	1,902	57	1,846	923
Virginia Health Law Forum		1,595	1,156	35	1,122	561
						ERR
	TOTAL	$5,525	$3,058	$92	$2,968	1,484
Bridge Club		1,494	296	9	288	144
Cavalier Aviation Club		11,968	4,602	138	4,464	2,232
Charlottesville Grotto		206	208	6	202	101
Chess Club		3,059	620	19	602	301
Outing Club		711	398	12	388	194
Strategy Gaming Club		102	0	0	0	0
Yoga Club		675	0	0	0	0
						ERR
	TOTAL	$18,215	$6,124	$184	$5,944	2,972
Beyond War at UVA		255	Defunded	Defunded	Defunded	ERR
Federalist Society		4,601	3,826	115	3,712	1,856
J.B. Moore Soc. of International Law		872	782	23	760	380
Society of Architectural Historians		300	170	5	166	83
Student Alliance of Landscape Ar.		467	320	10	312	156
Student Legal Forum		10,489	6,854	206	6,650	3,325
Students for Accountability		530	Defunded	Defunded	Defunded	ERR
Students for Rape Awareness		854	32	1	32	16
Washington Literary Society		4,323	712	21	692	346
						ERR
	TOTAL	$22,690	$12,696	$381	$12,324	6,162

Group		Request	Alloc.	3% Cut	Final Allocation	
American Medical Student Assoc.		1,351	784	24	762	381
Blue Ridge Mountain Rescue Group		9,027	7,162	215	6,948	3,474
Business Forum		4,011	1,016	30	986	493
Gay and Lesbian Law Students Assoc.		383	272	8	264	132
Information Systems Group		1,673	0	0	0	0
Law Students for Public Service		1,264	904	27	878	439
Legal Assistance Society		6,544	6,094	183	5,912	2,956
Lesbian and Gay Student Union		2,528	1,644	49	1,596	798
Monroe Society		3,392	930	28	904	452
Student National Medical Assoc.		1,457	1,458	44	1,416	708
Student Watch		2,291	1,108	33	1,076	538
Theta Tau Engineering Society		954	Defunded	Defunded	Defunded	ERR ERR
	TOTAL	$34,875	$21,372	$641	$20,742	10,371
Black Law Students Assoc.		4,701	2,548	76	2,472	1,236
Black Student Alliance		4,663	880	26	854	427
Student Self-Advocacy Group		3,314	1,208	36	1,172	586 ERR
	TOTAL	$12,678	$4,636	$139	$4,498	2,249
	TOTALS	537,792	272,500	8,175	264,316	132,158 ERR

[1989-90 Student Activity Fee Allocation Release
Omitted in printing Due to Illegibility]

1990-91 STUDENT ACTIVITY FEE ALLOCATIONS RELEASE

	Total Allocation	First Semester Allocation
Category 1:		
Club Sports Council	1168	584
TOTAL	1168	584
Category 2:		
AIAS	1048	524
AISEC	638	319
Daniel Hale Williams Black Pre-Med	762	381
Die Deutsche Gesselschaft	312	156
Graduate Society Black Engineers	320	160
International Business Society	616	308
International Relations Organization	1150	575
National Society of Black Engineers	738	369
Philosophy Club	528	264
Pre-Vet Society	1136	568
Senior Classical League	422	211
Society of Architectural Historians	320	160
Student Alliance of Landscape Architectures	320	160
Undergraduate Economic Club	258	129
Washington Literary & Debating Club	940	470
TOTAL	9508	4754
Category 3:		
Archery Club	740	370
Cavalier Road Runner Club	1298	649
Dance Club	436	218
Golf Club	754	377
Judo Club	1422	711
Mountain Biking Club	622	311
Okinawan Kempo Karate Club	1502	751
Racketball Club	104	52
Sailing Association	870	435
Shotokan Karate	226	113
Uechi Ryu Karate Club	740	370
Va. Alpine Ski Assoc.	5444	2722
Va. Cycling Club	1386	693
Va. Fencing Club	2962	1481
Va. Floor Hockey Club	542	271
Va. Riding Team	2680	1340
Va. Rifle and Pistol Team	3284	1642
Va. Rowing Association	7862	3931
Va. Soccer Club	1778	889

	Total Allocation	First Semester Allocation
Va. Ultimate Frisbee Club	3150	1575
Va. Volleyball Club	2158	1079
Va. Women's Rugby Football	3970	1985
Water Polo Club	1596	798
Women's Soccer Club	1520	760
TOTAL	47046	23523
Category 4:		
COUP	12324	6162
Declaration	9100	4550
Journal of Law and Politics	5570	2785
Loki Science Magazine	1952	976
Oculus	4788	2394
Seasons	3598	1799
Thoughtlines	4188	2094
University Journal	8944	4472
Va. Environmental Law Journal	6732	3366
Va. Journal of International Law	5998	2999
Va. Tax Review Assoc.	7074	3537
Virginia Advocate	2852	1426
TOTAL	78120	36560
Category 5:		
Audio Visuals Unlimited	1746	873
TOTAL	1746	873
Category 6:		
Asian Student Union	1912	956
Assoc. for Arab-American Understanding	376	188
Assoc. of Afri-Carib Cultures	806	403
Camerata Rotunda	2004	1002
Chinese Student Association	1018	509
C. S. Lewis Society	222	111
Disco Beat, Yellow Journal	3016	1508
Glee Club	8296	4148
Indian Student Association	368	184
Japanese Club	540	270
Musique	666	333
Organization of Young Filipino-American	800	400
Va. Literary Review	3044	1522
Va. Pep Band	4936	2468
Va. Silhoouettes	1090	545
Va. Swing Orchestra	1614	807
Vietnamese Students Assoc.	362	181
TOTAL	31070	15535

	Total Allocation	First Semester Allocation
Category 7:		
Madison House	34830	17415
TOTAL	34830	17415
Category 8:		
Post-Conviction Project	3620	1810
Va. Health Law Forum	408	204
TOTAL	4028	2014
Category 9:		
Charlottesville Grotto	208	104
Outing Club	400	200
Va. Ski Club	76	38
TOTAL	684	342
Category 10:		
Alternatives: Perspectives	546	273
Beyond War	114	57
Darden Business Forum	668	334
Environmental Forum & Research Group	298	149
Federal Society	3842	1921
Gandhi Peace Center	668	334
J.B. Moore Society of International Law	490	245
Law Students for Public Service	228	114
Marketing Club of Darden	1600	800
Sports & Entertainment Law Forum	502	251
Student Legal Forum	3694	1847
Students for Animals Rights	360	180
TOTAL	13010	6505
Category 12:		
Blue Ridge Mountain Rescue	8052	4026
Circle K	198	99
Legal Assistance Society	2256	1128
Lesbian and Gay Student Union	1632	816
Monroe Society	786	393
SADD	266	133
Student Alliance for Virginia's Environment	140	70
Students for Rape Awareness	786	393
TOTAL	14116	7058

	Total Allocation	First Semester Allocation
Category 13:		
Asian-American Law Students	608	304
Council of Black Student Leaders	1318	659
Black Law Student Association	4380	2190
Va. Law Women	1030	515
TOTAL	7336	3668
TOTAL	237662	118831

EXHIBIT 12

Constitution of *Wide Awake Productions*

Article 1: Purposes of *Wide Awake Productions* (Hereafter referred to as *Wide Awake.*)

1.) To publish a magazine of philosophical and religious expression.

2.) To facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints.

3.) To provide a unifying focus for Christians of multicultural backgrounds.

Article 2: Membership of *Wide Awake.*

1.) Wide Awake does not discriminate in its membership on the basis of sex, race, color, religion, handicap, national origin, or sexual orientation.

2.) Any person who contributes significantly to an issue of any *Wide Awake* publication or attends 78% of all meetings of the full membership for one semester shall be a full member of *Wide Awake.*

Article 3: Governing Bodies of *Wide Awake.*

The governing bodies of *Wide Awake* shall consist of the Executive Board and the Managing Board. The size and membership of each Board shall be determined jointly by the CEO and the Chairman of each Board.

1.) Executive Board: Responsible for the editorial content of all *Wide Awake* publications. Creates and executes the fiscal policy of *Wide Awake.*

2.) Managing Board: Responsible for the production and layout of all *Wide Awake* publications. Liases [sic] with University organizations.

Article 4: Officers of *Wide Awake*.

1.) Chief Executive Officer: Coordinates and supervises activities of the Managing and Executive Boards. Confirms appointments to and decisions of the Boards. Acts as Editor-in-Chief of all *Wide Awake* publications.

2.) Chairman of the Executive Board: Appoints members to the Executive Board. Presides over Executive Board. Acts as Executive Editor of all *Wide Awake* publications.

3.) Chairman of the Managing Board: Appoints members to the Managing Board. Presides over Managing Board. Acts as Managing Editor of all *Wide Awake* publications.

Article 5: Expenditures of *Wide Awake*.

Expenditures shall be made in accordance with fiscal policy developed by the Executive Board and approved by the CEO and Managing Board.

Article 6: Elections of *Wide Awake* Officers.

All officers shall be elected by a majority vote of the full members. Elections shall be held each spring semester by April 15. New officers will take office at the end of each spring semester. Elections will be carried out in accordance with rules adopted by the governing Boards and the CEO.

Article 7: Amendments

Amendments to this Constitution shall be composed by the governing Boards and the CEO and confirmed on a two-thirds vote of the full membership.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

(Title Omitted in Printing)

AFFIDAVIT OF RONALD J. STUMP

I, Ronald J. Stump, do hereby depose and state:

1. I am an Associate Dean of Students at the University of Virginia. I have served in this position since 1985. My previous experience includes serving as Director of Student Activities at Michigan State University, and as an Assistant Dean of Students and Director of Student Activities at Northern Michigan University.

2. My responsibilities as Associate Dean of Students include providing guidance to the Student Council in allocating student activity fee monies among eligible student organizations and activities in accordance with the "University Student Activity Fee Statement of Purpose and Funding Guidelines ("SAF Guidelines"), a policy the University Board of Visitors has adopted and charged the Student Council to administer. I also serve as chairman of the Student Activities Committee, a panel comprised of students, faculty, and administrators that provides oversight and hears appeals of student organizations which contest denial of funding.

3. Under the SAF Guidelines, the "purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virgina." Both the Student Council and the Student Activities Committee are specifically directed to administer the limited SAF funds "in a manner consistent with the educational purpose of the University

as well as with State and Federal law" (*See* University SAF Guidelines, p. 1).

4. Student activity fees are public funds that are derived from a compulsory fee collected annually from each full-time student as part of their tuition and fees. The total amount of SAF funds available for allocation each year among student organizations is obviously limited, and is invariably substantially less than the aggregate amount requested by eligible student organizations. For example, for the 1990-91 academic year 135 student organizations requested an aggregate amount of $501,277, while only $402,028 was available for allocation.

5. The SAF Funding Guidelines were originally adopted by the Board of Visitors in 1970. The SAF Funding Guidelines were revised in 1973, 1978, 1980 and 1991. Since the policy was originally adopted, and currently, the following student organizations have been deemed *incligible* to receive SAF funds: fraternities, sororities, honor societies, political organizations, religious organizations, and organizations whose membership is exclusionary in nature or engage in unlawful discrimination. Additionally, certain expenditures and activities are deemed not related to the educational purpose of the University are not eligible for funding: honoraria or similar fees; religious activities; social entertainment or related expenses; philanthropic contributions and activities; political activities; and activities which would jeopardize the University's tax exempt status. (*See* University SAF Guidelines, p. 2.)

6. The University has a procedure, separate from the SAF funding system, for entering into a relationship with student organizations. All student organizations which execute an annual agreement with the University become Contracted Independent Organizations (CIOs) and thereby are entitled to access and use of University facilities, for the organizations' meetings, functions, and programs.

7. In order to apply for SAF funds, a student organization must be a CIO. However, to be entitled to receive

SAF funds the CIO must further satisfy the eligibility criteria separately set forth in the University SAF Guidelines. For academic year 1990-91, 343 student organizations qualified as CIOs. Of the 343 CIOs, 135 student organizations applied for SAF funds in 1990-91 and 118 were allocated SAF monies.

8. In determining the eligibility of CIOs for SAF funds, the Student Council (as a delegated agent of the Board of Visitors) customarily examines written and oral statements of applying organizations to ensure compliance with criteria contained in the University SAF Guidelines. Such an examination typically entails review of the organization's purpose and objectives as embodied in constitutions, charters, publications, and related amplifying statements of officers during the Student Council allocation hearings. In certain instances the examination extends beyond a review of documents and statements that reveal an organization's purpose: "In determining cases of discrimination, it is not sufficient to look merely to the constitution of an organization but to its actual practices and operations." (*See* University SAF Guidelines, p. 2.) The University does not approve the constitutions or charters of student organizations.

9. In January 1991, the Wide Awake student organization applied for SAF funds to support the publication of the *Wide Awake* magazine. The organization requested funding in the amount of $5,862.00 for the 1991-92 academic year. This was the first and only application for SAF funding that Wide Awake submitted to Student Council. There is no assurance that even if eligible for funding *Wide Awake* would have received the entire requested amount. Furthermore, the funded allocation is not given to an organization to be put into its own savings or checking accounts. The money is held by the University, and disbursed by the Student Activities Business Manager through a voucher system.

10. The Student Council Appropriations Committee, following a review of Wide Awake's constitution and its

first issue of the *Wide Awake* magazine (Nov./Dec. 1990), decided not to fund the organization's request because the publication was determined to be a "religious activity" and thus not eligible for funding under the SAF Guidelines. The rationale for the Committee's decision was communicated in a letter dated February 26, 1991, from Cynthia J. Wilbricht, Student Council Vice President for Student Organizations, to Ronald W. Rosenberger, Chief Executive Editor of Wide Awake Productions.

11. On or about March 3, 1991, Wide Awake timely appealed the Student Council's Appropriation Committee's decision to the full Student Council. At its March 19, 1991 meeting, the Student Council voted to uphold the funding denial decision.

12. Wide Awake subsequently submitted an appeal to the Student Activities Committee, which held a public hearing on April 8, 1991. The Student Activities Committee voted unanimously that *Wide Awake* was ineligible to receive SAF funding. I notified Mr. Rosenberger of the Committee's decision in a letter dated April 16, 1991, which stated in part:

> ". . . After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake Productions and by Student Council, the committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from Ms. Cyndi Wilbricht. As noted in Ms. Wilbricht's letter, Wide Awake Productions may still print and distribute copies of the magazine and as a CIO has full and equal access to other University facilities and services. . . ."

13. The decision not to fund the *Wide Awake* publication was based on the group's intent as stated in their constitution and in the first edition of the organization's

magazine. The editor stated that *Wide Awake's* mission was to challenge Christians to live according to their faith and to encourage students to consider what a personal relationship with Jesus Christ means. In public statements during the organization's application and appeal process, *Wide Awake* editors also acknowledged that the magazine has "a Christian focus and a Christian editorial thrust," that the editors want the magazine "to glorify God," and that the organization "opens each meeting with a prayer."

14. Other student groups like Black Voices, the C. S. Lewis Society, the Jewish Law Students Association, and the Muslim Students Association have qualified in the past for SAF funding as "cultural organizations."

15. Black Voices was funded in 1990-91 but did not apply for funding in 1991-92 because the organization's officers felt they had become a religious organzation. During the 1990-91 appropriation process which occurred in the Spring of 1990, the Black Voices representative was asked if the group engaged in religious activity. The representative did say yes. In further discussion which included the definition of religious activity used by the Student Council appropriation committee, the representative said no.

16. During the Fall of 1990, I met with the Black Voices' President and talked with him about the group's activities and whether they were religious. He said the group itself had begun to consider that maybe they had drifted away from simply singing Gospel music as a Black cultural activity and more toward a religious group. They now were praying at practices and encouraging members to be more of a model of faith. He said the group as a whole was going to make a decision. Later in the Fall semester, he said the group decided they wished to be a religious group and would change their constitution to reflect this decision. The group's constitution was, in fact, changed. Consequently, Black Voices did not apply for funding for 1991-92.

17. Student Council has funded publications and media groups which have expressed religious opinions and similar matter as an incidental part of their activities. The reason for these groups' existence and the nature of the activities themselves are not to evangelize or to principally express a religious perspective.

18. Wide Awake Productions has not been denied access to space, equipment, and facilities at the University of Virginia. As a CIO, Wide Awake has been and is accorded the same access and use of University facilities as other CIOs. Also, use of computers, printers, and other special equipment in Peabody Hall is open to all groups which produce a publication including *Wide Awake*.

19. There are currently about 17 religious organizations qualified as CIOs, none of which have sought or received SAF monies.

/s/ Ronald J. Stump
RONALD J. STUMP

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

(Title Omitted in Printing)

AFFIDAVIT OF TREVON GROSS

I, Trevon Gross, do hereby depose and state:

1. I was a student at the University of Virginia, having graduated from the College of Arts and Sciences in May, 1991. For four years, I was a member of Black Voices, a student organization that has been recognized as a Contracted Independent Organization ("CIO") at the University. I served as Vice-President for Musical Development of Black Voices during the 1990-91 academic year.

2. Black Voices was established, to my knowledge, about 19 years ago. During my tenure as vice-president of the organization (and currently, I believe), Black Voices has had about 130 members.

3. In 1990-91, the organization sought and received funding support from the Student Activity Fee administered by the Student Council in accordance with the Student Activity Fee Guidelines adopted by the Board of Visitors ("SAF Guidelines"). At the time, when the organization applied for SAF funds, the purpose of Black Voices, as stated in the organization's Constitution attached to this affidavit as Exhibit A, was "to invite individuals to congregate for the intent of singing gospel and contemporary religious music." The SAF funds granted to Black Voices for the 1990-91 academic year were used to cover the costs of equipment and apparel for the or-

ganization and travel expenses to attend out-of-state choir events.

4. When Black Voices sought funding for the 1990-91 academic year, it did so as a "cultural organization." In response to a question raised during a Student Council Appropriations Committee Hearing, then President Brad Braxton remarked that Black Voices occasionally engaged in religious activities. However, upon further discussion of the applicable definition of "religious activity" under the SAF Guidelines, Mr. Braxton clarified that the organization was a "cultural activity," and not a "religious activity."

5. During the Fall of 1990 members of Black Voices engaged in internal discussion about the main purpose of the organization. Some members felt that the organization should confine itself to cultural activities, while other members felt that the focus of the organization was shifting from simply singing gospel music to assuming a more religious character. During rehearsal meetings, for example, the group was periodically engaging in prayer and encouraging members to be more of a model of faith.

6. As a consequence of the organization's internal discussion, Black Voices' members voted to adopt a new constitution in the early Spring, 1991 semester. That Constitution, which serves as the Black Voices' current charter, now states the purpose of the organization is "to provide an opportunity for people to assemble in Christian fellowship and song. Moreover, by singing this music, the choir aims to share the Afro-American culture with others as well as express spiritual principles. . . . Black Voices represents God, the Afro-American culture at the University." A copy of the organization's current condition is attached to this affidavit as Exhibit B.

7. Because of the organization's deliberate decision to shift its purpose to one that would be acknowledged as a religious activity, Black Voices did not seek SAF funds for the 1991-92 year. Nor, to my knowledge, would the

organization so qualify under the SAF Guidelines, which exclude religious organizations and religious activities from SAF funding.

/s/ Trevon Gross
TREVON GROSS

[Notarization Omitted in Printing]

Constitution
Black Voices of the University of Virginia

Article I:

NAME. The official name of this organization is Black Voices of the University of Virginia.

Article II:

Purpose. The purpose of Black Voices is to invite individuals to congregate for the intent of singing gospel and contemporary religious music. Black Voices' main objective is to carry this music into the university and residential communities.

Article III:

Membership. Black Voices is open to anyone that is interested in volunteering their musical abilities to the organization. Black Voices does not discriminate on the basis of race, color, religion, national origin, political affiliation, handicap or sex. This policy complies with the requirements of the Virginia Constitution, Article I, Section 11, Titles VI and VII of the Civil Rights Acts of 1964, as amended and the Rehabilitation Act of 1973.

Article IV:

Officers. Officers of Black Voices must be registered officially with the University of Virginia. The offices are as follows:

President:

To serve as a chief executive.

Vice President:

Acts as president in the absence of the president.

Treasurer:

To keep financial records of Black Voices and make necessary deposits and withdrawals of the funds.

Co Treasurer:

To assist the treasurer in his/her duties.

Secretary:

To draft letters, respond to letters and make arrangements for engagements through correspondence.

Dues/Attendance Clerk:

To keep a tentative record of present dues paying members and their attendance at rehearsals and engagements.

The above named offices constitute a board that shall work together as a governing body. They have the power to make policies and have control of all expenditures.

Article V:

Elections. The offices of President, Vice President, Treasurer, Co Treasurer, Secretary and Dues/Attendance Clerk shall be occupied through the parliamentary procedure.

Two thirds of the voting body (official dues paying students) is needed to elect an officer. The term for each office is one year.

Section 1. The position of committee chairperson shall be filled on a voluntary basis. Persons who serve on the committee shall also be selected on a voluntary basis. The size of the committee shall depend on the service the committee is providing and will be left up to the discretion of the committee chairperson.

Section 2. The removal of any officer or chairperson shall be discussed by the board members and brought before the entire body of Black Voices for discussion. After discussion there will be a vote and the major-

ity decision will decide on the outcome of the individual in question.

Article VI:

Committees. The Board (President, Vice President, Treasurer, Co Treasurer, Secretary and Dues/ Attendance Clerk) shall preside as a standing committee and will discuss major issues (finances, engagements) concerning the welfare of Black Voices. This committee shall function as a governing body.

Article VII:

Meetings. Black Voices meets on every Thursday (excluding student holidays and summertime) for two hours in the evening. This rehearsal is conducted in the music department.

Section 1. The Board shall meet once every month (except student holidays and summertime) to discuss business at hand. This meeting's time and place shall be agreed upon by the Board members.

Article VIII:

Finances. Each member is expected to contribute ten dollars as dues.

Section 1. Each member is asked to submit a patron's list with contributions from persons not in the choir.

Section 2. Fund raising projects will require cooperation and support from all members. Members will volunteer to serve on different projects.

Section 3. All funds, self generated and allocated by student council shall be used to purchase equipment, uniforms, and pay for travel expenses for Black Voices and any hired musicians, directors, etc.

Section 4. Monies will be used only after members vote. Only students of the university are allowed to vote on monies allocated by student council.

Section 5. All funds are to be used in a non discriminatory fashion.

Article IX:

Amendments and By Laws. Permission is granted to amend the preceding articles with the consensus of two thirds of the voting members.

CONSTITUTION OF BLACK VOICES OF THE UNIVERSITY OF VIRGINIA

Article I:

Purpose

Black Voices of the University of Virginia is a choir that sings music of the African-American culture (i.e. anthems, spirituals, classical music, contemporary gospel, etc.). The purpose of this organization is to provide an opportunity for people to assemble in Christian fellowship and song. Moreover, by singing this music, the choir aims to share the African-American culture with others as well as express spiritual principles.

Rendering music at the University of Virginia and elsewhere, Black Voices provides an excellent opportunity for University of Virginia students to interact with residents of the Charlottesville-Albermarle communities, other college choirs, and each other in a setting not provided by any other organization on Grounds. Black Voices represents God, the African-American culture and the University.

Article II:

Membership

Although the membership is largely composed of University students, non-students are welcome. Membership is on a semesterly basis and is contingent upon payment of dues and adherence to the established attendance policy. Black Voices does *not* discriminate on the basis of race, creed, color, sex, religion or national origin.

Article III:

Meetings

Black Voices will hold regular rehearsals. Time and location of rehearsals and other meetings will be

determined by the Executive Board. The Executive Board will meet periodically, as deemed necessary. Six of the ten executive board members will determine a quorum.

Article IV:

Finances

Each member will be expected to pay non-refundable dues each semester. The amount of and due date for dues will be determined by the Executive Board.

Article V:

Officers and Job Descriptions

Executive Board

A. The Executive Board will consist of the following officers: President, Vice President for Administration, Vice President for Musical Development, Secretary, Membership Director, Co-Treasurers, Sergeant at Arms, Materiels [sic] Manager and Historian.

B. The Board will be responsible for the administrative aspects of the choir.

President

A. Will be the Chief Executive Officer and chief spokesperson of the organization.

B. Will preside over the Executive Board and all of its subsidiary activities as an ex officio member.

C. Will have the power to delegate and to appoint offices and ad hoc committees as deemed necessary.

D. Will be responsible for presiding over all meetings and rehearsals of the choir.

Vice President for Administration

A. Will develop and implement the administrative aspects of the choir. This will include, but not be limited to, engagement and rehearsal attendance policies.

B. Will oversee the following members of the Executive Board; 1) Secretary; 2) Historian; and 3) Sergeant at Arms.

C. Will coordinate performance dates for Black Voices in conjunction with the Musical Committee.

D. Will assume the role and responsibilities of the President in that officer's absence.

E. Will undertake any additional duties as deemed necessary by the Executive Board to ensure the welfare of Black Voices.

F. Will report directly to the President.

Vice President for Musical Development

A. Will serve as chair of the Music Committee.

B. Will specifically oversee the activities of the Music Committee, and shall make all decisions in conjunction with said committee concerning the musical aspects of the choir and its engagements.

C. Will work with the Vice President for Administration and the Music Committee in the development of programs for engagements and concerts.

D. Will assume the role and responsibilities of the President in the absence of both the President and Vice President for Administration.

E. Will report directly to the President.

Secretary

A. Will be responsible for all correspondence.

B. Will take minutes at all Executive Board meetings and make them available to choir members upon request.

C. Will be responsible for announcements and publicity concerning the choir's engagements and concerts.

D. Will report directly to the Vice President for Administration.

Membership Director

A. Will be chair of the Membership Concerns Committee as an ex officio member (except in the case of a tie, the chair will be the deciding vote) and will serve as liaison between that committee and the Executive Board.

B. Will be responsible for developing and maintaining accurate membership lists and attendance records.

C. Will be responsible for maintaining a current membership directory.

D. Will report directly to the President.

Co-Treasurers

A. Will be responsible for all financial records, deposits of all monies, disbursements concerning the choir, collecting dues and for giving financial reports.

B. Will work with the Executive Board to develop a budget.

C. Will be responsible for presentation of the budget at the Student Council Appropriations Process.

D. Will be responsible for the administrative control of the finances of the choir.

E. Will report directly to the President.

Sergeant at Arms

A. Will be responsible for running orderly meetings and rehearsals.

B. Will serve as Parliamentarian at all meetings of the Executive board and choir.

C. Will report directly to the Vice President for Administration.

Materiels Manager

A. Will be responsible for the maintenance, distribution and collection of robes.

B. Will be responsible for the maintenance, storage, transportation and set up of musical equipment at all Black Voices engagements.

C. Will report directly to the President.

Historian

A. Will be responsible for developing and maintaining a scrapbook of Black Voices for that one year.

B. Will report directly to the Vice President for Administration.

Article VI:

Committees

Music Committee

A. Will consist of the following persons: Vice President for Musical Development, directors, musicians, section leaders, technical assistant, secretary and assistant secretary to the committee.

B. Will be chaired by the Vice President for Musical Development who will work in conjunction with said committee regarding the musical development of the choir.

C. The Music Committee will meet at the discretion of the Vice President for Musical Development.

D. Persons interested in becoming members of this committee will be required to submit a letter of intent to the committee which will then select members according to its established selection process.

Membership Concerns Committee

A. Will serve as the liaison between the Executive Board and the members at-large.

B. Will be chaired by the Membership Director.

C. Will consist of two elected representatives from each choral section. Representatives will be responsible for presenting the members' ideas and concerns to the committee which will in turn relay them to the Executive Board.

D. The recommendations made by the committee will be subject to the approval of the Executive Board.

Article VII:

Elections and Removal of Officers

Section I

Officers will be elected by a simple majority vote of the members in good standing present. (Qualifications for good standing will be determined by the Exectuive Board.) Elections will be held during the month of February at the discretion of the Executive

Board. Elections will be conducted by an ad hoc committee appointed by the President.

Elected officers will be installed at the last said meeting of the choir, and the term of office will be from that installation until the next installation of newly elected officers.

Section II

Officers may resign or be removed from office for failure to pay dues or to execute the office's proper duties. In the case of the latter, the Executive Board, by a majority vote, may recommend the dismissal of that officer to the choir. By two-thirds vote of the choir, the officer will then be dismissed.

THE CONSTITUTION MAY BE AMENDED BY ⅔ VOTE OF THE ENTIRE MEMBERSHIP.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

(Title Omitted in Printing)

AFFIDAVIT OF SAQUIB LAKHANI

I, Saquib Lakhani, do hereby depose and state:

1. I am a student at the University of Virginia and a member of the Muslim Students Association, a student organization that has been recognized as a Contracted Independent Organization ("CIO") of the University. I have been a member of the Muslim Students Association since September 1989, and I have served as President from November 1990 to November 1991.

2. As set forth in the constitution of the Muslim Students Association, which is attached as an exhibit to this Affidavit, the objective of the organization "is to aid Muslim students during their stay at the University and to promote a better understanding of Islam to the University community." The principal activities of the Muslim Students Association are to sponsor speakers and, as a recent initiative, to publish a news magazine, both of which are designed to promote Islamic culture. For example, last week the organization sponsored a speaker who made a presentation on the "Western Misconceptions about Islam." The news magazine, which is scheduled to be published soon, will contain articles on calligraphy, a translation of a Persian poem, news items extracted from international newspapers, and recipes of Muslim cuisine.

3. The Muslim Students Association was established in December 1987. It currently has about 30 members. The organization meets about twice a month. The meet-

ings begin with the officers handling administrative business. Otherwise, they have no set agendas, rather they are essentially informal gatherings of students sharing a common cultural background. The meetings provide members an opportunity to share ideas and insights on subjects of mutual interest. For example, during the Gulf War members voiced their views and discusses [sic] their concerns.

4. At no time during the meetings do officers or members of the Muslim Students Association engage in any religious rituals or activities, read from religious texts, or recite prayers or invocations to a deity. Nor has the organization produced, published or distributed any religious pamphlets or publications among members or non-members.

5. The Muslim Students Organization sought and received funding support from the Student Activity Fee administered by the Student Council in accordance with the Student Activity Fee Guidelines adopted by the Board of Visitors ("SAF Guidelines"). For the 1989-90 academic year, the organization received $164. Because of a failure to meet the funding application deadline, the Muslim Students Association did not receive SAF funds for the 1990-91 academic year. The organization has obtained $264 in SAF funds for the current 1991-92 academic year. The organization applied for and was granted SAF funds in the above noted amounts as a "cultural organization" which is defined in the SAF Guidelines as "an organization which is primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art and/or tastes."

6. To my knowledge, the Muslim Students Organization has not received any complaints that the organization engages in religious activities, that SAF funds are impermissibly used for religious activities, or that it is improperly classified as a "cultural organization" under the

SAF Guidelines, except for the complaint raised by officers of the *Wide Awake* student organization in the course of the organization's unsuccessful quest for SAF funding.

/s/ Saquib Lakhani
SAQUIB LAKHANI

[Notarization Omitted in Printing]

CONSTITUTION OF THE MUSLIM STUDENTS ASSOCIATION AT THE UNIVERSITY OF VIRGINIA

as submitted to Student Council on December 10, 1987.

ARTICLE I. Title of the organization

The Muslim Students Association at the University of Virginia.

ARTICLE II. Objectives of the organization.

The objective of the MSA at Uva is to aid Muslim students during their stay at the University and to promote a better understanding of Islam to the University Community.

ARTICLE III. Membership.

Anybody who wishes to participate will be allowed to do so. Voting members will be restricted to those who pay membership dues.

ARTICLE IV. Officers.

There shall be seven elected officers forming the executive committee. This committee will be in charge of all organization activities. The seven posts are as follows:

1. The president handles all external affairs of the organization and carries out programmes of the organization as spelled out by the executive committee. The president is also authorized to spend the organization's money.

2. The vice-president acts as president in the absence of the president.

3. The secretary records the minutes of the meeting and organizes membership lists.

4. The treasurer keeps the accounts of the organization and is authorized to spend the organization's money.

5. The organizing secretary will coordinate the activities of the organization with the general membership.

6. There will be two (2) members-at-large who will complete the executive committee.

ARTICLE V. Election and removal of officers.

Elections will be held in March each year. Nominations for each position will be accepted, and the nominee who receives the most votes will become the officer until the elections of the following year. A two-thirds vote of all the members present excluding the officer in question is required to remove him/her from office. Immediately after the removal of any officer, the above election procedure will be used to fill the vacant post. A quorum of one-third of all voting members must be present to undertake the election or removal process.

ARTICLE VI. Finances.

To gain voting member status, a member must pay one dollar in annual dues. The treasurer and the president are authorized to spend the money of the organization. A simple majority of at least one-third of all voting members will be required to approve a budget prepared by the executive committee.

ARTICLE VII. Amendments to the constitution.

A two-thirds vote of at least one-third of all voting members is required to amend the constitution.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

(Title Omitted in Printing)

AFFIDAVIT OF MICHAEL TOW

I, Michael Tow, do hereby depose and state:

1. I am a student at the University of Virginia and currently serve as the President of the Jewish Law Students Association, a student organization that has been recognized as a Contracted Independent Organization ("CIO") of the University. I have been a member of this organization since August 1990 and I have served as an officer for the past four months.

2. The purpose of the Jewish Law Students Association is set forth in the organization's by-laws which are attached as an exhibit to this Affidavit. Succinctly, the purpose is to represent and promote the interests of Jewish law students through a series of social, educational, and cultural activities. Specifically, the organization sponsors (or co-sponsors with other groups) speakers on a variety of topics of interest to Jewish law students and law students at-large; arranges luncheon presentations by professors from the Law School and the Graduate Business School; and coordinates social acivities. Examples of presentations the organization has sponsored include lectures on: "Complex Tort Litigation" by Kenneth Feinberg, and on "Judaism and Homosexual Rights" by Rabbi David Kaye. This Spring the organization plans to host the attorney who represents the Baltimore Orioles.

3. The Jewish Law Students Association currently has about 75 members, and three officers including myself.

No dues are charged members. The organization is open to any interested law students; the current membership includes several non-Jewish students, one of whom also serves as Vice-President. The officers meet periodically, about four times each semester, to plan the organization's activities. At no time during these meetings does the organization engage in any religious prayer or invocation to a deity or read from any religious texts. Nor has the organization produced, published, or distributed any religious pamphlets or publications among its officers or members. Furthermore, no religious symbols are placed in any rooms during the conduct of the officers' meetings.

4. The Jewish Law Students Association over the past three years since the organization was established sought and received funding support from the Student Activity Fee administered by the Student Council in accordance with the guidelines adopted by the Board of Visitors ("SAF Guidelines"). The organization received $1,134 for the 1990-91 academic year. Because of a failure to meet the application deadline, the organization did not receive SAF funds for the current 1991-92 academic year. The organization applied for and received SAF funds in this amount as a "cultural organization," which is defined in the SAF Guidelines as "an organization which is primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art and/or tastes."

5. The SAF funds the Jewish Law Students Association received in 1990-91 were used solely to support expenses the organization incurred for photocopying, printing, and registration fees and travel costs associated with a trip to the national convention of the National Jewish Law Students' Network. At no time has the organization used any SAF monies for religious activities, as that term is defined in the SAF Guidelines ("an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality").

6. Each year the Jewish Law Students Association sponsors a "holiday dinner" known as the Seder. This event is an incidental part of the organization's activities. The Seder dinner is held off grounds and both Jewish and non-Jewish students attend. The cost of the Seder dinner is basically covered by participation fees paid by those attending. No SAF monies are used to cover the costs of the Seder dinner.

7. To my knowledge, the Jewish Law Students Association has not received any complaints that the organization engages in religious activities, that SAF funds are impermissibly used for religious activities, or that it is improperly classified as a "cultural organization" under the SAF Guidelines, except for the complaint raised by officers of the *Wide Awake* student organization in the course of the organization's unsuccessful quest for SAF funding.

/s/ Michael H. Tow
MICHAEL TOW

[Notarization Omitted in Printing]

By-Laws
of the
University of Virginia
Jewish Law Students Association

I. *Name.* The name of this organization shall be the University of Virginia Jewish Law Students Association (JLSA).

II. *Purposes.* The purposes of this organization shall be:

1. To encourage Jewish law students to participate in Jewish activities no matter what their religious background.

2. To improve the quality of Jewish life in the Law School, on Grounds, and in the surrounding community. To represent the interests of Jewish law students. To do legal work which will help promote the interests of the Jewish community.

3. To be a focal point for Jewish activities at the Law School and to organize such activities.

4. *Tax Exempt Status.* Other sections of these by-laws notwithstanding, the JLSA shall engage in no activities which would make it ineligible for tax exempt status. To that end, the JLSA is organized exclusively for charitable, religious, and educational purposes. No part of the net earnings of the JLSA shall inure to the benefit of, or be distributable to its members, officers, or other private persons except as reasonable compensation for services rendered or expenses incurred. The JLSA will not engage in any activities attempting to influence legislation, nor will it directly or indirectly participate or intervene (including publishing or distributing statements) in any political campaigns on behalf of any candidate for public office or any other activity not within the

charitable, religious, and educational purposes set out above. Upon the dissolution of the JLSA, if such dissolution occurs, all of its assets, net of its liabilities (specifically including its liabilities, if any, to the University of Virginia or the Student Council of the University of Virginia) shall be distributed to Jewish organizations operated exclusively for charitable, religious, or educational purposes and which shall at the time qualify as tax-exempt organizations under the Internal Revenue Code.

5. To enhance the Law School administration and faculty's awareness of the special needs and interests of Jewish law students.

6. To participate in the National Jewish Law Students Network.

7. To enhance the understanding of all law students at the Law School of the culture and religion of their Jewish classmates.

III. *Membership.*

1. Membership shall be open to all members of the Law School community. The JLSA shall actively seek the membership of Jewish law students. Non-Jewish law students who wish to join the JLSA may do so. Other graduate students at the University of Virginia may participate in JLSA activities as non-members. Only JLSA members may vote and hold office.

IV. *Officers.*

1. Each year the membership shall elect four officers: President, Vice-President, Treasurer, and Secretary. Elections shall be held in the spring semester at a duly called general meeting and shall be run by the President. The terms of the officers shall start upon a date fixed by resolution at the general meeting. They shall serve until their successors are chosen and the term of those successors begins. Any vacancies among the officers shall be filled by a vote of the Executive Board for the remainder of the current school year. Officers may be removed by a two-thirds vote of the Executive Board.

2. *President.* The President shall be the chief executive officer of the JLSA. She/he shall call and chair all Executive Board and general meetings, appoint committees and their chairs, be the organization's representative to the National Jewish Law Students Network Executive Board, and serve as the spokesperson for the JLSA to the Law School community and to the public at large. The President shall have primary responsibility for developing the next generation of leadership for the JLSA.

3. *Vice-President.* The Vice-President shall chair all meetings in the absence of the president and shall become President upon the resignation or removal of the President. She/he shall assist the President in all JLSA activities.

4. *Treasurer.* The Treasurer shall be responsible for all financial affairs of the JLSA, including the raising and expenditure of funds. She/he shall have sole authority to sign checks on the JLSA account. However, she/he shall authorize the expenditure of sums over ten dollars only if there has been prior authorization by the Executive Board.

5. *Secretary.* The Secretary shall be responsible for maintaining the records of the JLSA and for keeping minutes of all general and Executive Board meetings.

V. *Executive Board.*

1. The Executive Board shall consist of all the elected JLSA officers and any JLSA members unanimously elected by the officers of the JLSA.

2. Anyone may attend Executive Board meetings, which shall be held periodically after notice, but such notice may be waived by a vote of the majority of the Executive Board.

3. The Executive Board shall authorize all projects and approve all expenditures in excess of ten dollars. It shall advise the President on all issues which come before the JLSA.

4. The Executive Board may, on its own behalf only, take a stand on an issue of interest to Jewish law students, only by unanimous agreement of the members of the Executive Board. All such communications shall be signed, "The Executive Board of the Jewish Law Students Association".

5. No individual may take a stand on behalf of the JLSA without the unanimous consent of the Executive Board.

6. The Executive Board, may, on behalf of the JLSA as a whole, take a stand on an issue of interest to Jewish law students, only by unanimous agreement of the members of the Executive Board *and* by the agreement of 30% (or 30 in number, whichever is greater) of all Jewish law students at the University of Virginia. The President shall keep and maintain a list of the signatures of all those so consenting. All such communications shall be signed, "Jewish Law Students Association".

VI. *General Meetings.*

1. General Meetings of the entire membership shall be held whenever called by the President, but in any case no less frequently than once each year in the spring for the purpose of electing officers.

2. Except as provided in Paragraph V.4, 5, and 6, a quorum for doing business or holding elections at a general meeting shall be 10% of the membership,

or the current total number of the membership of the Executive Board, whichever is less.

3. General meetings shall only be called if reasonable notice has been given of the time and place of the meeting.

VII. *Adoption and Amendment.* These by-laws shall be adopted and may be amended by a two-thirds vote of those present at a duly called General Meeting.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

(Title Omitted in Printing)

AFFIDAVIT OF JAMES KOZLOSKI

I, James Kozloski, do hereby depose and state:

1. I am a student at the University of Virginia and currently serve as the President of the C. S. Lewis Society, a student organization that has been recognized as a Contracted Independent Organization ("CIO") of the University. I have been a member of this organization since September 1989 and I have served as the President for the past two years.

2. As stated in the constitution of the C. S. Lewis Society, the purpose of the organization is "to promote interest in, discussion of various literary, moral, and philosophical topics, with particular emphasis on the work of the 'Oxford Christians'." Despite the reference to "Oxford Christians" in the constitution that was prepared when the C. S. Lewis Society was formed three years ago, the purpose and focus of this study group is currently—and has been for the past two years that I have served as President—broader. In other words, there is no particular emphasis on the study of the Oxford Christians. Rather, the main purpose of the C. S. Lewis Society is to study and discuss topics that cross several disciplines.

3. The organization's activities essentially entail weekly meetings of the group's 15-25 members, during which they discuss essays, poems, and excerpts of novels by such authors as Emily Dickinson, Nietzsche, Dostoyevski, and C. S. Lewis. The organization often invites University professors to lead the discussion groups, including

professors from the English Department, the Religious Studies Department, the Philosophy Department, and the History Department.

4. At no time during the meetings of the C. S. Lewis Society does the organization engage in any religious prayer or invocation to deity or read from any religious texts. Nor has the organization produced, published, or distributed any religious pamphlets or publications among its officers or members. Furthermore, no religious symbols are placed in any rooms where meetings are held.

5. The C. S. Lewis Society sought and received funding support from the Student Activity Fee administered by the Student Council in accordance with the Student Activity Fee Guidelines adopted by the Board of Visitors ("SAF Guidelines"). The organization received $96 in 1989-90, $220 in 1990-91, and currently receives $220 for 1991-92. This SAF funding support is used exclusively to cover photocopying costs for study and discussion materials circulated among the members.

6. The C. S. Lewis Society applied for and was granted the SAF funds as a "cultural organization" which is defined in the SAF Guidelines as "an organization which is primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art and/or tastes."

7. To my knowledge, the C. S. Lewis Society has not received any complaints that the organization engages in religious activities, that SAF funds are used for religious activities, or that it is improperly classified as a "cultural organization" under the SAF Guidelines, except for the complaint raised by officers of the *Wide Awake* student organization in the course of the organization's unsuccessful quest for SAF funding.

/s/ James Kozloski
JAMES KOZLOSKI

[Notarization Omitted in Printing]

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(3)

No. 94-329

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,
v.
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF INTERCOLLEGIATE STUDIES INSTITUTE IN SUPPORT OF PETITIONERS

ROBERT M. RADER
Counsel of Record
DONN C. MEINDERTSMA
KAREN L. GRUBBER
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amicus Curiae Intercollegiate Studies Institute

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Intercollegiate Studies Institute ("ISI") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. Consent to file this brief has been obtained from counsel for petitioners, but counsel for respondents have declined to consent. Correspondence reflecting the respective positions of the parties has been filed with the Clerk.

The petition seeks review of the determination by the United States Court of Appeals for the Fourth Circuit that the Establishment Clause of the First Amendment not only permits, but virtually compels, the University of Virginia to abridge the free speech rights of a student group duly established in accordance with University guidelines

by excluding it from sharing in the disbursement of pooled student fees collected to fund student activities. As a nationally prominent student-oriented organization, ISI has a compelling interest and commensurate ability to address the important Free Speech and Establishment Clause issues raised in this case from the perspective of the thousands of college and university students and faculty who, in a multitude of contexts, are more broadly affected by the discretion of university administrators and committees, which may restrict controversial political, religious, and philosophical expression by university students.

ISI is a nonprofit, nonpartisan, tax-exempt educational organization founded in 1953 to instill among college students a better understanding of the values and institutions that sustain a free society, and to nurture in these future leaders an allegiance to the American ideal of ordered liberty. To accomplish this goal, ISI acts to deepen student appreciation of our Nation's founding principles of limited government, individual liberty, personal responsibility, free enterprise, and moral standards.

ISI maintains a network of over fifty thousand members and volunteer representatives that embraces virtually every college campus in the United States. Through its integrated program of lectures, conferences, publications, and fellowships, ISI annually reaches hundreds of thousands of students and faculty throughout the United States through ISI-sponsored activities. Over twenty-five hundred ISI student representatives and faculty associates annually assist in the dissemination of ISI publications and organization of ISI activities on more than one thousand college campuses.

ISI sponsors approximately forty conferences each year, including four regional leadership conferences and two summer schools. Also, to introduce students to the ideals of liberty, ISI regularly brings noted speakers to college and preparatory school campuses. Through this ambitious lecture program, ISI sponsors over three hundred lectures annually. However, ISI's sponsorship of these lectures is dependent upon ISI's ability to receive partial subsidization from the schools to cover the costs of the speakers' fees. Frequently, ISI is unable to sponsor a particular lecture because a school or university refuses to subsidize the lecture based on the religious or political views of the speaker.*

ISI publishes four journals and other publications with more than 850,000 copies distributed annually, including *The Intercollegiate Review*, ISI's flagship journal, and *CAMPUS: America's Student Newspaper*, written entirely by college students. In addition, ISI publishes *Modern Age*, a quarterly forum for preeminent thinkers, and *The Political Science Reviewer*, an annual review of scholarship. ISI also publishes books by leading scholars and authors and other text and reprints. Finally, ISI annually awards tuition and stipend fellowships to graduate students committed to perpetuating our Nation's heritage by teaching liberal arts at the undergraduate level. These fellowships have created an active network of some four hundred educators and intellectual leaders at campuses throughout the country.

The fundamental issue presented by the petition—the right of a student group to participate in a general funding program sponsored by a state university free of viewpoint-based discrimination—is of paramount importance to ISI, its student and faculty members and its many supporters. Academic freedom at colleges and universities is not merely a central tenet of ISI's philosophy but also a necessary ingredient for its propagation. Official university decisionmaking that restricts student free speech on

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*** Ironically, many schools will refuse to fund a lecture by a religious speaker while funding a secular speaker who addresses an identical topic. For example, most schools would refuse to subsidize a speech by a representative of the National Catholic Conference regarding the abortion controversy, but would subsidize a representative of the National Organization of Women addressing the same subject.**

admittedly viewpoint-based grounds, like the decision of the University of Virginia at issue here, is anathema to ISI and those students and professors who take part in its varied programs and activities.

For the foregoing reasons, the motion by ISI for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

ROBERT M. RADER
Counsel of Record
DONN C. MEINDERTSMA
KAREN L. GRUBBER

WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amicus Curiae
Intercollegiate Studies Institute

September 21, 1994

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IN THE
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No. 94-329

RONALD W. ROSENBERGER, *et al.*,
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v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

Amicus Intercollegiate Studies Institute ("ISI") supports the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. ISI's interests in this case are set forth in the Motion that precedes this brief and are not reiterated in detail here. In sum, however, the court of appeals' judgment that the

University of Virginia may withhold funds from a single student organization solely on account of the perspective the students espouse is of grave concern to ISI. As an organization that represents thousands of students on campuses nationwide and as a sponsor of lectures, conferences, publications, and other fora in which students and other members of the university community are encouraged to express their viewpoints on a wide range of topics of interest to campus communities, ISI urges this Court to grant certiorari to address the substantial constitutional questions raised in this case.

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions concerning the interplay of the core constitutional rights guaranteed by the Free Speech and Establishment Clauses of the First Amendment. The court of appeals sanctioned the abridgement of free speech rights in a setting that this Court has recognized as "peculiarly the 'marketplace of ideas' " and especially deserving of First Amendment solicitude—the public university campus. *Healy v. James*, 408 U.S. 169, 180 (1972). The decision below, moreover, addresses an issue of nationwide import because it deals with a university activity that is commonplace—the funding, through mandatory student fees, of various college-related, student-initiated functions.

Petitioners challenge the constitutionality of the University of Virginia's guidelines ("the Policy") for the distribution of monies from the University's Student Activities Fund ("SAF" or "the Fund"). The University collects a mandatory student activities fee from all students, deposits the fees into the Fund, and then, via approval of the University's Student Council, disburses the monies to support "the wide variety of student organizations, activities, and publications that function at the University." Pet. App. 2a.[1] Funds do not go directly to

[1] "Pet. App." citations are to the appendices to the petition for a writ of certiorari.

student organizations but rather are used only to reimburse expenses incurred by those organizations. Pet. App. 4a.

Petitioners—a group of University students—formed Wide Awake Productions. This student organization publishes *Wide Awake*, a magazine designed to facilitate "philosophical and religious expression" on campus. Pet. App. 5a. During the 1990-91 academic year, the University funded fifteen student publications that promoted diverse viewpoints, Pet. App. 4a & n.3,[2] but denied Wide Awake Productions' request for reimbursement of the expenses the students incurred in printing *Wide Awake*. The University admittedly singled out Wide Awake Productions for discriminatory treatment because the Policy broadly forbids the allocation of funds to "religious activities." Pet. App. 3a-4a.

The United States Court of Appeals for the Fourth Circuit correctly ruled that the Policy violated the petitioners' First Amendment free speech rights. Under the Policy, according to the court of appeals, "religious expression . . . is never allowed to compete for funds with other forms of speech that might be indulged by University students." Pet. App. 24a. Despite the conspicuous Free Speech Clause violation, the court of appeals found that the University's discriminatory treatment of petitioners was "justifie[d]" by the Establishment Clause. Pet. App. 38a. According to the court, reimbursement of *Wide Awake*'s printing costs would have the "primary effect" of advancing religion and would cause excessive entanglement between the State and religion. Pet. App. 34a-38a. Having found that the University's Establishment Clause fears justified the abridgement of free speech rights, the court of appeals rejected petitioners' challenge

[2] In addition, over 100 student organizations, including the Muslim Students Association and the Jewish Law Students Association, also obtained expense reimbursement from the Fund during the relevant time period. Pet. App. 4a.

under 42 U.S.C. § 1983 that the Policy was unconstitutional.

Under our Constitution, state-endorsed hostility toward a particular form of student-initiated expression engendered by the University's Policy and sanctioned by the court of appeals has no place on our public campuses. *Amicus* ISI therefore supports the petitioners in urging that this Court grant certiorari and reverse the judgment of the court of appeals.

I. THE COURT OF APPEALS' DECISION HAS NATIONWIDE IMPORTANCE BECAUSE PUBLIC COLLEGES AND UNIVERSITIES COMMONLY DISTRIBUTE FUNDS TO STUDENT GROUPS AND MUST OBEY THE FIRST AMENDMENT IN DOING SO.

1. Public colleges and universities have long been recognized as fortresses of the First Amendment, where the right of free speech is carefully protected to ensure an atmosphere conducive to the free exchange of information and ideas. *E.g., Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (holding that the right to receive information and ideas is " 'nowhere more vital' than in our schools and universities"). This open atmosphere not only contributes to the learning process but is a necessary part of learning itself. As the Court has noted, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

When a student enrolls in a public college or university, he does not check his constitutional rights at the ivy-covered gate. The right of free speech, unfettered by viewpoint-discriminatory regulation, extends to all students. *Healy*, 408 U.S. at 180 ("[S]tate colleges and

universities are not enclaves immune from the sweep of the First Amendment."). Any restrictions on this right are subject to strict scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *see also Bishop v. Aronov*, 732 F. Supp. 1562, 1565 (N.D. Ala. 1990), *rev'd on other grounds*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 302 (1992).

Because the Nation's secondary schools and universities are cornerstones of learning and discourse, the very essence of First Amendment freedom, this Court has historically shown great solicitude in granting certiorari to vindicate the rights of students engaged in real or symbolic speech. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *West Virgina State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Indeed, in *Widmar* this Court explicitly bespoke the "special constitutional solicitude" owed to the First Amendment rights of students. 454 U.S. at 276. More recently, the beneficiaries of this solicitude have been students attending secondary schools and universities who have rightfully sought equal entitlement to benefits generally available to the student body, but who have been denied such benefits out of a purported desire to avoid an Establishment Clause violation. This Court has readily granted certiorari to rectify such injustice. *Widmar*, 454 U.S. 263; *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Because free speech is necessary for the proper education of our Nation's students and because the Constitution jealously protects such speech, the court of appeals' decision, which severely limits the protection afforded to student-initiated religious expression on university campuses, is deeply troubling. The Court should grant certiorari and address the important issues raised in this case.

2. The role of religious expression in student-funded activities presents a commonplace and nationwide issue. The collection of mandatory student activities fees that are then distributed to eligible student groups to promote diverse causes is a commonplace university activity. Like the University of Virginia, however, many public colleges broadly discriminate against all religious viewpoints by refusing to disburse monies from their student activities funds to otherwise-eligible student groups that wish to engage in religious speech or publication. Public college campuses have in recent years proven a fertile field for conflict between student groups that seek to espouse religious—or, more broadly, "politically incorrect"—viewpoints on the one hand and university administrators, student councils, or other organizations that exercise discretion in distributing student activities funds.

Recent events on the campus of the Metropolitan State College in Denver provide but one example. A campus group there recently sought funding for a program that would express a Catholic perspective on human sexuality. The program was designed as a rebuttal to an anti-Catholic program that had been funded by the school. Choosing to discriminate against speech defending religious ideals, the school refused to provide funding, citing considerations of "diversity and separation of church and state."[3] *See also Tipton v. University of Hawaii*, 15 F.3d 922, 926 (9th Cir. 1994) (rejecting facial challenge to policy of the University of Hawaii student organization that prohibited reimbursement of funds to religious activities, but not deciding whether the University could "outright refuse to fund all student religious organizations while funding the activities of other student groups").

An informal survey conducted by counsel for ISI demonstrates that discrimination on our campuses against

[3] Unlike the University of Virginia, Metropolitan State College later retreated from this discriminatory position. *See Catalyst, Journal of the Catholic League for Religious and Civil Rights*, July-Aug. 1994, at 2.

religious viewpoints is widespread. Representatives from several public colleges and universities contacted in the survey stated that their schools, like the University of Virginia, would not provide funding from their student activities funds to a student group that wished to publish a "Christian perspective" magazine because such conduct would constitute "religious activity."[4]

ISI's survey also reveals that the policies of our Nation's public colleges and universities are far from uniform in terms of providing student activity funds to students who engage in religious expression. Representatives from other schools surveyed stated that they would provide such funding to a religiously oriented student group so long as the group did not maintain exclusionary membership criteria.[5] Accordingly, while some university policies are in accord with the court of appeals' decision in that they discriminate against religious activities, other schools have reached a contrary legal conclusion and do not feel compelled, as did the University of Virginia, to discriminate against religious speech out of concern for the Establishment Clause.

Almost six million students are enrolled in our Nation's public colleges and universities[6] and are affected by the

[4] These schools included Arizona State University; George Mason University; Northern Arizona University; Towson State University; the University of Arizona; the University of California, Berkeley; the University of California, Davis; the University of Delaware; the University of Georgia; the University of Hawaii, Manoa; the University of Maryland; and the University of South Carolina.

[5] These schools included the University of Alaska, the University of Connecticut, and the University of Florida. The University of Connecticut has provided funding to the Christian Fellowship Club. Similarly, the University of Florida has provided funding to the Campus Crusade for Christ, the Jewish Student Union, a gospel choir, and an organization of African-American Christians. University of Florida Student Body Law 94-109.

[6] American Ass'n of State Colleges and Univ. & Nat'l Ass'n of State Univ. & Land-Grant Colleges, *Enrollment at Public Four-*

disparate student activities fund policies now in place. Because of the nationwide importance of the issues raised in this case, the Court should determine the validity of the court of appeals' interpretation of the First Amendment.

II. THE COURT OF APPEALS' ERRONEOUS RESOLUTION OF A CONFLICT BETWEEN THE FUNDAMENTAL GUARANTEES OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT MERIT REVIEW BY THIS COURT.

The court of appeals found that the University's Policy failed to ensure neutrality toward religious speech and instead created an "uneven playing field" that discriminated against religious speech and gave the advantage toward "wholly secular modes of expression." Pet. App. 26a. "In reaching and forbidding funding for speech that meets the definition of 'religious activity,' but not for speech of other types, the SAF guidelines discriminate among speech on the basis of its content." *Id.* The court of appeals thus found that the University's discrimination against religious speech "violates the Speech and Press Clause" of the First Amendment. Pet. App. 34a.

The court of appeals then charted a course that this Court has never taken: the court held that the abridgement of petitioners' Free Speech and Press Clause rights accomplished by the University's discrimination against religious speech was "justified" by the University's fear of an Establishment Clause violation. Pet. App. 38a. Relying on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the University argued in its defense that a policy that did not exclude "religious activities" from the pool of funds—*i.e.*, a policy neutral toward religious activity—would have caused it to work "an establishment of religion" on

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Year Colleges and Universities (1994) (stating that 5.78 million students enrolled in public four-year colleges and universities in 1993).

campus. The court of appeals agreed, finding that a broad funding exclusion for all "religious activity" was necessary to avoid an establishment of religion. Pet. App. 38a-39a.

1. This Court should grant certiorari because the decision of the court of appeals presents a fundamental constitutional issue that this Court has yet to address: whether, and if so, under what circumstances, Establishment Clause concerns "trump" the guarantees of the Free Speech and Press Clause. This Court has at least twice explicitly left open this fundamental issue. In *Widmar v. Vincent*, the Court readily determined that a state university had violated its students' First Amendment rights of free speech and association by excluding them from using otherwise available facilities for purposes of religious worship or discussion. 454 U.S. at 267-77. The Court rejected the university's argument that a bar against religious activity was necessary to satisfy the Establishment Clause, and therefore did not "reach the questions that would arise if . . . free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." *Id.* at 273 n.13.[7] In *Mergens*, the Court likewise rejected an Establishment Clause defense to the use of high school facilities for student-initiated religious activities and did not decide the students' free speech claims. 496 U.S. at 253. Having reserved the issue, the Court should now address it. *See Mueller v. Allen*, 463 U.S. 388, 390-91 (1983) (granting certiorari because the Court had previously reserved judgment on the question presented).[8]

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[7] The Court in *Widmar* "agree[d] that the interest of [a] University in complying with its constitutional obligations may be characterized as compelling" for purposes of determining whether the school had a sufficient interest to defeat the students' free speech rights. 454 U.S. at 271; *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (discussing this aspect of *Widmar*).

[8] This Court's crèche cases also fail to offer guidance in this area. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court found

The conflict presented by the holding below is "a constitutional conflict of the highest order." *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 557 (3d Cir. 1984) (addressing clash between students' free speech rights and Establishment Clause concerns), *vacated on jurisdictional grounds and remanded*, 475 U.S. 534 (1986). As one commentator recently noted: "If students and teachers have a protected right of freedom of religious speech and the state's compelling interest is avoiding an establishment of religion, the resulting constitutional conflict is of paramount significance." D. Grant Carwile, Note, *When Freedom of Speech in the Classroom Conflicts with the Establishment Clause: Bishop v. Aronov*, 14 U. Ark. L.J. 83, 96 (1991).[9]

The lower courts have noted the need for direction from the Court in this sphere. In *Bender*, for example, the court of appeals stated that the courts have been

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no Establishment Clause violation and accordingly did not address any conflict with free speech rights. In *County of Allegheny v. American Civil Liberties Union*, the Court found that the crèche violated the Establishment Clause, but it was not in a public forum. 492 U.S. 573, 600 n.50 (1989); *see also* Daniel Parish, *Private Religious Displays in Public Fora*, 61 U. Chi. L. Rev. 253, 253-54 (1994) (footnotes omitted):

> Private religious displays in public fora present a legal and philosophical quandary. On the one hand, the Free Speech Clause generally prohibits content-based restrictions on private expression in the public forum. . . . On the other hand, the Establishment Clause requires that the government not endorse one religion over another or religion over irreligion. When the government appears to sponsor religion by allowing private religious expression in a public forum the doctrines collide.

[9] The commentator added:

> Is the Establishment Clause to be placed in a position of permanent supremacy over the Free Speech Clause? Should free speech rights always take precedence? Should these determinations be made on a case-by-case basis with a careful weighing of the competing interests under the facts and circumstances of each case? As recently as 1990, the Court has declined to resolve these issues.

Carwile, *supra*, at 96-97 (citing *Mergens*) (footnotes omitted).

"left with no definitive guidance from the [Supreme] Court as to the proper direction to take in th[e] unique circumstance" where rights guaranteed by the Free Speech and Establishment Clauses collide. 741 F.2d at 557. Similarly, in *Smith v. County of Albemarle*, 895 F.2d 953, 961 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990), where the majority held that Establishment Clause concerns justified content-discriminatory speech restrictions, the dissent noted the "absence of a mandate from the Supreme Court on the 'head-to-head' clash of these two competing First Amendment rights." Another commentator has noted: "Due to the lack of guidance from the Supreme Court, lower courts addressing the conflict between the Free Speech and Establishment Clauses have had to struggle in their attempt to arrive at an appropriate resolution of the issue." Raymond W. Mitchell, *A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause*, 23 Loy. U. Chi. L.J. 867, 878 (1992).

In conflict with the decision below, other courts have refused to accord preference to the Establishment Clause. For example, in *Doe v. Small*, 964 F.2d 611, 618-19 (7th Cir. 1992) (en banc), the majority held that the Establishment Clause "was an insufficient interest to justify a content-based exclusion" of speech in the form of religious artwork from a public park. The concurring opinion emphasized that the Constitution "neither creates nor tolerates" a "rule" that government must cure Establishment Clause violations by abridging the right of individuals to engage in religious speech. *Id.* at 629 (Easterbrook, J., concurring). In *Bender*, the court of appeals noted that *Widmar* did not hold that the Establishment Clause would automatically override free speech. 741 F.2d at 558. "Such a holding," continued the court, "would place the Establishment Clause in a position of permanent supremacy over the free speech clause, a constitutional hierarchy which we do not think the Framers intended." *Id.* The court nevertheless decided

that Establishment Clause concerns outweighed free speech interests in the specific facts of the case. *Cf. Carey v. Brown*, 447 U.S. 455, 467 (1980) (stating that protection for public speech "has always rested on the highest rung of the hierarchy of First Amendment values").

Recent commentary highlights the sharply divisive views of the free speech-disestablishment conflict. First Amendment scholar John Whitehead contends that "religious expression is a preferred first amendment right and cannot be contravened by any establishment clause concerns." John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 Pepp. L. Rev. 229, 231 (1989). Professor Laycock notes that " 'secularists' tend to think that the need for disestablishment takes precedence over free speech and free exercise rights in substantially all cases of conflict." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 7 (1986). In defending the federal Equal Access Act, *see Mergens*, Laycock argues that "[b]arring discrimination against religious speech is . . . consistent with the establishment clause" because it furthers government neutrality toward religion. *Id.* at 22.

2. The clash between Free Speech and Establishment Clause guarantees is nowhere more evident, or troublesome, than in the educational arena, as the decision below confirms. *E.g.*, Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking*, 24 N.M. L. Rev. 1, 1 (1994): "[T]he intersection of the Religion and Speech Clauses of the First Amendment has become increasingly controversial, particularly in the context of public schooling."

For example, in *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert denied*, 113 S. Ct. 2344 (1993), the court of appeals overturned a school district's long-established practice to permit the Gideons to dis-

tribute Bibles on school property. When the school district in its defense noted that other groups had been permitted to address students, the court ruled that in the public school context the Establishment Clause "automatically trumps" the First Amendment interest in free expression. *Id.* at 1166-68. Religious expressive activity, according to the court, "may be stifled in the government's vigilance to remain neutral toward religion." *Id.* at 1168.

The Ninth Circuit likewise recently ruled that a school district's interest in avoiding an Establishment Clause violation "trumps" a teacher's right to exercise free speech. *Peloza v. Capistrano Unified Sch. Dist.*, Nos. 92-55228, 92-55644, 1994 WL 382635, at *4 (9th Cir. July 25, 1994). As with almost all circuit court decisions addressing the colliding First Amendment values, however, the court of appeals panel was itself divided on this important question. Judge Poole dissented from the majority's holding that the Establishment Clause justified a gag on free speech rights, emphasizing that "[w]e must . . . remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others." *Id.* at *9 (Poole, J., dissenting in part).

In contrast, the Court of Appeals for the Eighth Circuit in *Good News/Good Sports Club v. School Dist of the City of Ladue*, No. 93-2148, 1994 WL 328572, at *8 (8th Cir. July 12, 1994) (to be published at 28 F.3d 1501), concluded that a school policy of viewpoint discrimination violated the Free Speech Clause and rejected the school's Establishment Clause defense. The goal of the *Good News* Club was to foster the moral development of junior high school students from the perspective of Christian religious values. *Id.* at *1. While the school originally had a neutral policy, it amended the policy to close the school district to all community groups expect athletic and Scout groups in the weekday afternoon hours during which the Club previously had

met. The amended policy also provided that the Scouts' meetings "shall not include any speech or activity involving religion or religious beliefs." *Id.* at *2. The Eighth Circuit agreed with the Club that the amended policy was impermissible as viewpoint-discriminatory. The Scout groups and the Club engaged in "exactly the same category of speech"—the moral and character development of the students, *id.* at *4—and the amended policy impermissibly permitted the Scouts to express their perspective on the subject while prohibiting the Club's religious viewpoint. *Id.* at *5 (citing *Lamb's Chapel*). Unlike the decision below, the Eighth Circuit rejected the school district's Establishment Clause defense.[10]

3. This Court should grant review of this case to ensure that the Establishment Clause is not improperly—or excessively—applied in a way that erodes free speech rights. The court of appeals' ready acceptance of the premise that the Establishment Clause supersedes, and serves as a barrier to, the religious speech of students creates a risk that disestablishment will be employed as an instrument by those who are intolerant of such speech. *See Doe v. Village of Crestwood*, 917 F.2d 1476, 1494 (7th Cir. 1990) (Coffey, J., dissenting) ("The Establishment Clause of the First Amendment was never intended to be used as a sword to suppress and stifle the religious practices or beliefs of American citizens."), *cert. denied*, 112 S. Ct. 3025 (1992). *See also* Whitehead, *supra*, at 237 ("Giving establishment interests precedence over free exercise interests creates a bludgeoning effect in that the establishment clause becomes a weapon to repress free speech and exercise rights."); Laycock, *supra*, at 27 (noting that improperly expansive application of the Establishment Clause "has been the basis of repeated efforts to censor religiously motivated speech. . . . [T]he free speech rights of religious citizens are denied in the name of separation of church and state.").

[10] *See also Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991) (noting that "[a]djustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing" and holding that the Establishment Clause did not justify a ban on a high school student's right to distribute literature).

Cognizant that excessive application of the Establishment Clause endangers free speech, judges and commentators alike have advocated that the Establishment Clause not be used to defeat free speech rights absent concrete injuries of the sort the Establishment Clause was designed to avert. For example, dissenting in *Village of Crestwood*, Judge Coffey stated: "I believe it is time for the judiciary to rethink our First Amendment jurisprudence and return to harms capable of concrete definition and objective analysis, before claims are recognized, as we do in every other area of law." 917 F.2d at 1491. Similarly, while concurring with the holding in *Washegesic v. Bloomingdale Pub. Sch.*, that a public school must remove from its hallway a portrait of Jesus Christ, Judge Guy warned against the "establish[ment] of a class of 'eggshell plaintiffs' of a delicacy never before known to the law. I can well understand that someone . . . in some sense could be offended by this portrait, but 'injured' is another matter." No. 93-1248, 1994 WL 475999 (6th Cir. Sept. 6, 1994), at *4.[11] One commentator advocates "a more realistic balancing of the competing constitutional values" by replacing a presumed infringement, such as the presumption that students are impressionable and will perceive state sponsorship in a given activity, "with a concrete evidentiary standard" that requires proof of a material and substantial injury before student speech may be restricted. D. Jarrett Arp, *Beyond Mergens: Balancing a Student's Free Speech Right Against the Establishment Clause in Public High School Equal Access Cases*, 32 Wm. & Mary L. Rev. 127, 158-59 (1990). Another

[11] *See also Roberts v. Madigan*, 921 F.2d 1047, 1060-63 (10th Cir. 1990) (Barrett, J., dissenting) (emphasizing that Establishment Clause violations should be based on actual findings of improper religious indoctrination, not on mere speculation).

writer urges that "[c]ourts should weigh in the balance the particularized governmental interests that are actually at stake rather than abstract or hypothetical interests such as the potential dangers of public unrest." Salomone, *supra*, at 24. The court of appeals addressed none of these compelling concerns in its "balancing" of First Amendment freedoms.

Absent instruction from this Court, public universities, like the University of Virginia, will maintain, promulgate, or perhaps expand policies that, with wide sweep, discriminate against student-initiated speech solely because the viewpoints expressed are rooted in religious ideals. The University's Policy, and the court of appeals' ruling, are based on the premise that some students or faculty might perceive the sharing of funds by organizations that support religious speech as state sponsorship of religion, but this concern seems amply negated by existing University proclamations that funding "should not be misinterpreted as meaning that . . . the University approves of the organizations' goals or activities." Pet. App. 2a-3a. Further, the court had before it no empirical evidence of "establishment." *Cf. Widmar*, 454 U.S. at 275 (noting absence of empirical evidence that religious groups would dominate an open forum). At a minimum, the court of appeals' elevation of ephemeral or illusory Establishment Clause concerns to justify ongoing and actual free speech abridgment not only curtails the free speech rights of the *Wide Awake* students, but also creates a chilling effect on the exercise of student free speech, particularly religious speech, nationwide.[12] This Court should grant review to

[12] There are many who would prefer that religious perspectives be silenced even in the most important political debate. For example, when a Catholic organization argued that health care reform legislation should not encompass abortions, Representative Donald Edwards (D-Cal.) did not conceal the fact that he "resent[ed] that certain religious groups are entering this political fight." *Abortion Issue Divides Health Care Support*, Wash. Post, July 14, 1994, at A4. *See generally* Laycock, *supra*, at 27:

> [W]hen Catholic bishops speak out on abortion, nuclear weapons, economic redistribution, and peace in Central America, . . . someone on the other side of the political issue is sure to charge that these attempts to influence public policy violate separation of church and state. A moment's reflection on free speech and free exercise reveals the absurdity of that charge . . . .

devise an appropriate analysis for resolving Free Speech-Establishment Clause conflicts, and this case presents the Court with the opportunity to do so in the context in which these competing interests most often collide—the public education setting.

III. THE COURT OF APPEALS' ANALYSIS OF THE UNIVERSITY'S ESTABLISHMENT CLAUSE "DEFENSE" RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES THAT MERIT REVIEW BY THIS COURT.

1. This Court should grant certiorari in this case because close supervision of the Establishment Clause jurisprudence being developed by the lower courts is required. As this Court has stated, interpretation of the Establishment Clause does not lend itself to a "fixed, per se rule." *Lynch*, 465 U.S. at 678. Instead, the "line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 678-79. The Court has often noted as well that Establishment Clause cases present "especially difficult questions of interpretation and application," *Mueller*, 463 U.S. at 392, in an "extraordinarily sensitive area of constitutional law." *Lemon*, 403 U.S. at 612. Because the Court's jurisprudence in this extraordinarily important area "is of necessity one of line-drawing," *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992), "characterized by few absolutes," *Grand Rapids*

Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985), the Court should grant certiorari to guide the lower courts in addressing university policies that abridge religious speech.

2. In assuming that the threat of an Establishment Clause violation would present a state interest so compelling as to justify the abridgement of students' rights to be free of viewpoint-based discrimination, the court of appeals paid little heed to the fact that the speech abridged in this case was that occurring on a university campus—peculiarly the supposed marketplace of ideas. Addressing the "primary effect" prong of the *Lemon v. Kurtzman* test, the court concluded that nondiscriminatory funding of student activities, including funding of *Wide Awake*, would amount to "state sponsorship . . . of religious belief." Pet. App. 35a. Universities, however, are expected to tolerate and encourage broadly diverse viewpoints, and a reasonable student body and faculty would not interpret every act of tolerance as "sponsorship" of student-authored beliefs. "[O]ur nation's universities preserve a longstanding tradition of tolerating and even *encouraging the propagation* of all sorts of disbelieved opinions." *Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir.) (emphasis added), *cert. denied*, 113 S. Ct. 300 (1992). That, indeed, is the justification for collecting and disbursing student activities fees:

> One of the arguments used to justify allocation of activities fees to speakers or campus organizations that present controversial views is the educational necessity of exposing the university community to a diversity of responsible opinion. In fulfilling its role, it is expected that a university will strive for balance and afford adequate opportunity for opposing viewpoints.

Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

Viewpoints advanced solely via student-initiated speech, unedited and uncensored by the university, simply cannot be considered tantamount to "state sponsorship" of the

students' views. "While exposure to only a single point of view might indoctrinate rather than educate, exposure to debate between opposing viewpoints is educational and does not imply that a particular point of view is correct." Carolyn Wiggin, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009, 2107 (1994). This is true even if the expression of those views is furthered by a neutral funding scheme:

> Just as banning speech according to content within a public forum defeats the goal of allowing students to speak—and listeners to be exposed to speech—on representative viewpoints regarding topics of the day, selectively withholding funds from groups based on the viewpoint or content of their speech skews debate within the forum.

Id. at 2026-27.

The court of appeals likewise disregarded the university setting of this case and the particularly compelling free speech guarantees extant here when it addressed the third of *Lemon*'s prongs—that which prohibits excessive entanglement between church and state. The court feared that permitting the neutral distribution of funds to *Wide Awake* would create "the potential for seriously divisive political consequences at the University of Virginia." Pet. App. 37a. Our college campuses, however, are the primary locus for controversial speech. *E.g., Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) ("[F]ree speech is at the heart of teaching and universities by definition support speech—often extremely controversial speech."), *cert. denied*, 113 S. Ct. 1067 (1993). "Political divisiveness"—or more accurately in this case, a fear of possible divisiveness—cannot justify the abridgement of college students' free speech rights.

Further, the court failed fully to respect this Court's repeated admonitions that incidental benefits to religion do not create an establishment of religion. The University's Policy, were it neutral toward religion, would per-

mit the distribution of Fund monies to the printers of *Wide Awake*, not directly to the student group—just as monies are made available to reimburse the publication of myriad other student-led publications on campus. The funds would not aid any religious institution or establishment, but would assist a student group in espousing its perspectives by permitting it to share equally in a resource —the Fund—designed particularly for that purpose.

In any event, the court of appeals' fear that incidental funding through the reimbursement to the printers of *Wide Awake* would create "excessive entanglement" with religion conflicts with this Court's decision in *Widmar*. *Widmar* establishes that a university policy that is neutral toward and does not discriminate against religious speech "would avoid entanglement with religion." 454 U.S. at 271-72. Entanglement, after all, is "essentially a procedural problem." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976). This prong is offended only by " 'comprehensive, discriminating, and continuing state surveillance' " of religious activity. *Mueller*, 463 U.S. at 403 (quoting *Lemon*, 403 U.S. at 619). A policy that treats religious speech like all other speech would not entangle the affairs of Virginia with the affairs of religious establishments.

CONCLUSION

For the foregoing reasons, *amicus* ISI urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT M. RADER
Counsel of Record
DONN C. MEINDERTSMA
KAREN L. GRUBBER
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amicus Curiae
Intercollegiate Studies Institute

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No. 94-329

In the

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS
OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, FAMILY RESEARCH COUNCIL AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

Dean Edward M. Gaffney, Jr.
Valparaiso University
Law School

Steven T. McFarland
Counsel of Record
Samuel B. Casey
J. Randy Beck
Center for Law and
Religious Freedom
Christian Legal Society
4208 Evergreen Lane
Annandale, VA 22003
(703) 642-1070

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* the Christian Legal Society, the Catholic League for Religious and Civil Rights, the Christian Life Commission of the Southern Baptist Convention, the Church of Jesus Christ of Latter-Day Saints, the Family Research Council and the National Association of Evangelicals move for leave to file the attached brief *amici curiae*.

Petitioners Ronald W. Rosenberger, *et al.*, consented to the filing of this brief *amici curiae*, but respondents Rector and Visitors of the University of Virginia, *et al.*,

refused to consent. The refusal of Virginia state officials to agree to the submission of this brief perhaps suggests the wisdom of our Framers in abandoning the English system for licensing publications. Petitioners' letter of consent has been lodged with the Court.

Amici are churches and religious organizations with an interest in freedom of religious speech and publication. Many public university students are members of churches affiliated with these *amici*, or otherwise participate in their ministries. A more complete statement of interest for each *amicus* is included in the appendix.

Since they regularly present religious viewpoints in the marketplace of ideas and because of their long involvement in issues of religious liberty, these *amici curiae* are able to provide the Court with a unique perspective on the First Amendment issues raised in the petition for writ of *certiorari*. *Amici* have not repeated the arguments made in the petition, but rather have focused on the place of religious speech in American history and, particularly, the history leading up to the adoption of the First and Fourteenth Amendments. The historical materials presented serve to place this case in its broader context and show the importance of the constitutional issues raised. *Amici* therefore request that the Court accept the accompanying brief for filing.

Respectfully submitted,

Steven T. McFarland
Counsel of Record
Edward M. Gaffney, Jr.
Samuel B. Casey
J. Randy Beck

INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix.

ARGUMENT

Under the Fourth Circuit's reading of the Establishment Clause, a public university allocating funds for expressive activities must discriminate against religious students, even though such discrimination "violates the Speech and Press Clause" and is therefore "presumptively unconstitutional." Pet. App. 34a, 39a. All other students participate equally in campus life, regardless of viewpoint. Religious students, however, must censor their speech if they wish to satisfy university funding guidelines. Pet. App. 24a-26a.

The Fourth Circuit held that because *Wide Awake* publishes religious views, it is not entitled to the same speech and press freedoms as other publications. This analysis rests on two inaccurate premises. First, the court overlooks constitutional history when it reads the First Amendment to afford less protection to religious publications than to other members of the press. In Parts I and II of our brief, we show that the protection of religious speech was a central concern motivating both the First and Fourteenth Amendments.

Second, the Fourth Circuit wrongly assumes that religious expression is somehow distinct and severable from the political, philosophical and social discussion that occurs on public university campuses. On the contrary, religious speech often addresses issues debated in an academic setting, though from a distinctive perspective--one the Framers viewed as very important. In Part III, we show that the Fourth Circuit's attempt to artificially isolate religious speech from campus debate will impoverish discourse in public universities.

I. Publication of Religious Viewpoints Deserves the Highest Level of First Amendment Protection

A. Suppression of Religious Speech Was a Primary Defect of an Established Church

Early English emigrants to America included many religious refugees seeking to escape the influence of an established church. William Laud, Archbishop of Canterbury under Charles I, suppressed criticism of the Church of England and its hierarchy. One example gives a flavor of the times:

> In 1628, at [Laud's] instigation, a Puritan minister, Alexander Leighton, was indicted before the Star Chamber as the admitted author of a book that called the institution of bishops anti-Christian and satanic. He was put in irons and was kept in solitary confinement for fifteen weeks in an unheated cell "full of rats and mice, and open to snow and rain." His hair fell out, his skin peeled off. He was tied to a stake and received thirty-six stripes with a heavy cord upon his naked back; he was placed in the pillory for two hours in November's frost and snow; he was branded in the face, had his nose slit and his ears cut off, and was condemned to life imprisonment.

7 W. & A. Durant, *The Story of Civilization* 189-90 (1961). The brutal punishment of Leighton was aimed at both his deviance from the official orthodoxy of the established church and his temerity to spread his dissenting views through unlicensed publication. The Crown enforced religious orthodoxy by establishing the Church of England, and it sought to repress all forms of dissident speech, whether political or religious, by controlling the press through the notorious licensing system.

As search warrants from this period illustrate, the full severity of the licensing system was visited upon all religious and political dissidents, including Quakers and Roman Catholics. The term "seditious libel" referred not only to "treasonable" criticism of the Crown, but also to "scandalous" publication of "blasphemous" and "superstitious matter," including religious tracts or devotional material that were not in full conformity with the "doctrine and Discipline of the Church of England." *See, e.g., Copies Taken from the Records of the Court of King's Bench, at Westminster, Of Warrants Issued by Secretaries of State, etc.* 2 (Quaker), 5 ("Popish priest"), 15, 17, 27, 48 (publication of Roman Catholic manual of devotions), 49 (publication of Missals and Breviaries), 56, 74 (1763), *reprinted in The Literary Property Debate: Seven Tracts, 1747-1773* (P. Webb ed., 1974); *see also The Craftsman's Doctrine and Practice of the Liberty of the Press* 12, 20, 56-57 (1732), *reprinted in The Craftsman: Four Tracts 1731-1740* (1974). "Whether Catholics or Protestants, or Anglicans or Puritans, controlled the government, the compulsion of conscience for the sake of uniformity necessitated restraints on freedom of speech and press regarding religion." L. Levy, *Emergence of a Free Press* 5 (1985) (*"Emergence"*).

Persecution for religious speech was not as prevalent in America as in England. Nevertheless, there were still a number of attempts to suppress the speech of religious dissenters in the Congregationalist colonies of New England and the Anglican colonies of the South. For example, the first president of Harvard University, Henry Dunster, was convicted of breaching the peace and forced to resign after delivering sermons critical of infant baptism. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 34-35 (1906); *Emergence*, at 26.

Quaker immigrants suffered particular persecution. Quakers were notorious for confronting ministers and other acts of defiance, such as walking about naked to symbolize the spiritual nakedness of the people. A 1656 statute adopted in five Puritan settlements denounced Quakers as "heretickes" who "speak and write blasphemous opinions" about the government and the church. The statute penalized Quakers arriving in the colonies, as well as the master of any ship bringing them. Four Quakers were executed in Massachusetts when they defied decrees of banishment and returned to the colony. Others "of both sexes were stripped and flogged from town to town." Rhode Island declined to join in deportation of Quakers, reasoning that they "delight to be persecuted by civil powers" and where they are "suffered to declare themselves freely, and are only opposed by arguments in discourse, there they least of all desire to come." L. Levy, *Blasphemy* 255-59 (1993).

Baptists were also targeted. John Clarke and Obadiah Holmes were punished and banished from Massachusetts in 1651 for preaching against infant baptism. *Blasphemy*, at 254. According to one estimate, about fifty Baptists suffered imprisonment in Virginia for crimes such as preaching in unlicensed houses, preaching without Episcopal ordination, holding religious meetings "in other manner than according to the Liturgy and Practice of the Church of England" and preaching the gospel contrary to the Book of Common Prayer. L. Levy, *The Establishment Clause: Religion and the First Amendment* 3 (1986).

Attempts to suppress religious speech flared up during the pre-Revolution religious revival known as the Great Awakening. As the revival spread through the colonies, evangelical Christians challenged the established churches, encouraging colonists to rely on religious experience, rather than simply accepting the teachings of the established clergy. T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 96-99 (1986). As a result of evangelical challenges, many of the colonies attempted to legally suppress the new movement, which was perceived as overly emotional. In 1741, the attorney general of South Carolina initiated a prosecution for criminal libel against the most successful evangelist of the period, George Whitefield, for an article criticizing the established church of Charleston. Whitefield was released on bail and no indictment was issued. *Emergence*, at 59. Virginia banned itinerant preaching by Presbyterian evangelicals in the 1740's. Curry, at 99. Connecticut banned itinerant preaching in 1742. *Id.* at 96-97.

Attempts by established churches to suppress dissenting religious speech were still occurring on the eve of the Revolution. In a 1774 letter, James Madison complained of the jailing of Baptist preachers in Virginia:

> This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close [Gaol] for publishing their religious Sentiments which in the main are very orthodox.

5 *The Founders' Constitution* 60 (P. Kurland & R. Lerner eds., 1987).

B. The Desire to Protect Religious Speech Motivated Advocates of Press Freedom and Disestablishment

This history of suppressing religious speech provoked increasing pressure for freedom of the press, complemented by calls for an end to church establishments. These two movements coalesced in the drive for passage of the Virginia Act for Establishing Religious Freedom, shortly prior to adoption of the First Amendment.

1. English Advocates of a Free Press

The English Civil War displaced Laud and the Anglicans, and brought to power a Parliament dominated by Puritans and Presbyterians. The shift in the balance of power did not end the punishment of dissenting religious speech, however, merely changing for a time the definition of a dissenter. Nevertheless, the decade of the 1640's witnessed growing agitation for a wider freedom to publish religious views at odds with the prevailing orthodoxy. The most prominent advocate of a free press was John Milton, the Puritan pamphleteer who became Latin secretary to Oliver Cromwell's Council of State and later authored *Paradise Lost* and *Paradise Regained.* After Parliament passed a measure to control printing, Milton, without a license, published his *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (1644), *excerpted in* 1 *Norton Anth. of English Lit.* 1399 (4th ed. 1979).

Milton was merely the most prominent among several supporters of free religious expression. In 1644, *The Compassionate Samaritane*, by "Leveller" William Walwyn, advocated greater freedom of the press and the repeal of statutes limiting religious freedom. J. Frank, *The Levellers* 37 (1955). In his 1644 *Liberty of Conscience*, Henry Robinson promoted a complete freedom of the press in religious matters, extending beyond Protestants to "Papists, Jewes, Turkes, Pagans, Hereticks, with all Infidels & Misbeleevers." He argued for religious combat to be "fought out upon eaven ground, on equal terms, neither side must expect to have greater liberty of speech, writing, Printing, or whatsoever else, then the other." *Emergence*, at 93. Similarly tolerant was a 1646 reprint of an earlier tract by Leonard Busher, a Baptist, arguing that "all sorts of Christians; yea, Jews, Turks, and pagans," should be allowed "to write, dispute, confer and reason,

print and publish any matter touching religion, either for or against whomsoever." *Id.* at 101.

The opponents of state licensing of the press, including John Milton, often used theological arguments to attack this system of thought control. For instance, at the end of the 17th Century, an opponent of licensing writing under the pen name of "Philopatris" [lover of his country] noted the irony that this system of oppression

> robs us of that great Argument we make use of against the Mahometans; and what is worse, Popish religion, viz., That Ignorance is the Mother of their Devotions; since how can We justly brand their Religions, for being founded merely upon their Laicks Ignorance; when we in like manner discountenance Knowledge ourselves? How can we upbraid Papists for not daring to permit their Common people to read the Bible, when we do the same thing in effect, by tying all persons up to one man's Exposition and Interpretation of the same, viz., the Licenser's who will not permit any Exposition to come forth that thwarts his own particular Judgment.

A Vindication of Learning: or, An Humble Address to the High Court of Parliament in behalf of the Liberty of the Press (1679), *reprinted in Freedom of the Press: Four Tracts 1664-1693* (1975); *see also Reasons Humbly Offered for the Liberty of Unlicens'd Printing* (1693), *reprinted ibid.*

Later English advocates for freedom of religious expression exerted tremendous influence in the colonies. John Trenchard and Thomas Gordon worked in collaboration to publish *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects.*

"In the history of political liberty as well as of freedom of speech and press, no eighteenth century work exerted more influence than *Cato's Letters*." *Emergence*, at 114. One letter, published in 1721, argued:

> As long as there are such Things as Printing and Writing, there will be Libels: It is an Evil arising out of a much greater Good. . . . I must own, that I would rather many Libels should escape, than the Liberty of the Press should be infringed; yet no Man in England thinks worse of Libels than I do; especially of such as bid open Defiance to the present Protestant Establishment.

1 *Cato's Letters* 252-53 (photo. reprint 1971).

Also carrying great weight in colonial thinking was the position of John Locke, who argued that external government coercion could not bring about "inward persuasion of the mind," the essence of "true and saving religion." Locke denied that the magistrate's power extended "to the establishing of any articles of faith, or forms of worship, by the force of his laws," since laws require penalties and penalties "are not proper to convince the mind." J. Locke, *A Letter Concerning Toleration* (1684), *excerpted in Locke and Liberty* 107, 110-11 (M. Salvadori ed., 1960).

As the Revolution approached, an English clergyman pointed to an established church as the cause of infringements on religious expression. Reverend Philip Furneaux published *The Palladium of Conscience*, arguing that "a national establishment is in its nature opposite to the genius of Christianity" since "[t]ruth can only be supported and propagated by reason and argument." P. Furneaux, *The Palladium of Conscience* 23 (photo. reprint 1974) (1772). Two editions of Furneaux's work circulated in America before the Revolution. *Emergence*, at 164.

2. The Colonial Drive for Press Freedom and Disestablishment

Two men in particular deserve credit for importing expansive notions of religious freedom to the American colonies. Roger Williams, a minister expelled from Massachusetts, founded Rhode Island, known thereafter as the most religiously tolerant of the colonies. Williams' most important defense of religious liberty, published in 1644, was entitled *The Bloudy Tenent of Persecution for Cause of Conscience*. Among other points, Williams sought to demonstrate that:

> It is the will and command of God, that (since the comming of his Sonne the Lord Jesus) a permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, bee granted to all men in all Nations and Countries: and they are onely to bee fought against with that Sword which is only (in Soule matters) able to conquer, to wit, the Sword of Gods Spirit, the Word of God.

3 *The Complete Writings of Roger Williams* 3 (1963). "Williams addressed *The Bloudy Tenent* to Parliament, which repaid the unsolicited compliment by ordering the common hangman to burn the book." C. Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 193 (1953).

Another importer of religious liberty to the colonies was William Penn, a Quaker and the son of an English admiral. Following restoration of the monarchy, Penn was imprisoned in the Tower of London on order of the Privy Council pending an investigation of one of his books for "blasphemy" (really heresy). After eight-and-a-half months in prison, Penn won his release by publishing a new work clarifying his views on the Trinity and the divinity of

Christ. *Blasphemy*, at 216-18. In 1671, while in prison again for preaching, Penn wrote *The Great Case of Liberty of Conscience*. Penn later founded the colony of Pennsylvania, which became a haven for Quakers. 8 W. & A. Durant, *The Story of Civilization* 255-56 (1963).

The increasingly popular notion of "freedom of the press" in the colonies included the freedom to publish one's opinions on matters of both government and religion. A 1734 article in the *American Weekly Mercury* defined "Freedom of the Press" to include liberty "for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government." L. Levy, *Freedom of the Press from Zenger to Jefferson* 41 (1966). James Alexander, an attorney who participated in the defense of printer John Peter Zenger, wrote an essay arguing that "the Liberty of the Press is a liberty for every man to communicate his sentiments freely to the public, upon political or religious points." *Emergence*, at 126.

The growing respect for freedom of the press in the colonies occasionally led to jury nullification of government attempts to punish religious expression. For example, in a 1707 New York case, two Presbyterian ministers, Francis Makemie and John Hampton, were arrested for preaching without a license with intent to "spread their Pernicious Doctrine and Principles, to the disturbance of the Church by Law Established, and of the Government of this Province." The jury acquitted, quite possibly out of resistance to the notion that Anglicanism was the established religion of New York. *Emergence*, at 35-36; Curry, at 69-70.

Even voices within the established denominations joined in the call for freedom of religious expression. After Connecticut enacted its anti-evangelical law of 1742, Elisha Williams, former rector of Yale, published *The*

Essential Rights and Liberties of Protestants. Williams drew upon John Locke to proclaim the natural right of the religious person to determine the direction and expression of his conscience. While not opposed to an established church, Williams pointed to dangers from certain laws protecting the established religion. *See* R. Bushman, *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765*, 227-28 (1967).

Following the Revolution, the link between freedom of the press and the campaign for disestablishment was exhibited in the Virginia struggle for passage of the Act for Establishing Religious Freedom. Rejecting a proposal for tax-supported ministers, the Virginia Assembly instead adopted the statute drafted by Jefferson. The operative language provided that:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that *all men shall be free to profess, and by argument to maintain, their opinion in matters of religion*, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

5 *Founder's Constitution*, at 85 (emphasis added).[1] Implicit in the statute was an equation between the negative right to be free from compulsion by an established church and the

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[1]Funding a broad spectrum of speakers, including religious speakers, does not compel support of every message, but rather ensures robust discourse in the marketplace of ideas.

positive liberty to profess and argue for one's own religious views.

It was against this background that the First Amendment was drafted. Madison's original proposal for a Bill of Rights dealt with religious establishments in a different amendment from freedom of the press. It is appropriate that they were combined, however, because freedom of religious expression was a significant concern behind the Free Speech and Free Press Clauses. Likewise, the ban on an established church complemented the Free Press Clause, eliminating one of the primary reasons for government suppression of religious publications. As noted in the Williamsburg Charter, a bicentennial document signed by the Chief Justice, religious freedom "is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

Thomas Jefferson, the founder of the University of Virginia, opposed an established church in order to protect citizens' freedom "to profess, and by argument to maintain, their opinion in matters of religion." There is great irony in the fact that Jefferson's University now contends that allowing religious students to freely express their views with the same privileges as other students would violate the First Amendment. The Court should reject the Fourth Circuit's conclusion that religious speech deserves less constitutional protection in our public universities than other types of speech.

II. The Fourteenth Amendment Was Also Motivated By a Desire to Protect Religious Expression

This Court has incorporated free press protections against the states through the post-Civil War Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Professor Amar argues that "when we 'apply'

the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the Amendment of 1866, not the Bill of 1789." Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1266 (1992).

Analyzing the intent of the Fourteenth Amendment Framers requires an understanding of the abolitionist movement which influenced the Republican Reconstruction Congress. A significant impetus behind the Fourteenth Amendment was a history of attempts by slave states to silence the religious speech of abolitionists.

The abolitionist movement was spearheaded by devout religious believers who proclaimed a law of higher authority than that of encoded state law. Combining theological insights with the rich American tradition of natural rights, these freedom fighters based their zeal to eradicate slavery on the premise that all human persons are created by God as equals, and that to assault human dignity through enslavement was an egregious sin. *See* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479 (1950).

Abolitionist Christians made moral appeals concerning the evils of slavery through speeches, sermons and publications. *See, e.g.*, Graham, at 486-93, 620-21. Theodore Dwight Weld, for example, converted by the preaching of attorney Charles G. Finney, turned out many pamphlets central to the movement, such as *Slavery As It Is* (1839), *The Bible Against Slavery* (1837), and *The Power of Congress over the District of Columbia* (1838). Graham, at 487, 490. The *Weekly Emancipator*, an abolitionist newspaper, was edited by minister-lawyer Joshua Levitt,

and one of the most influential texts of the movement, *Letters on American Slavery* (1823), was written by the Reverend John Rankin. *Id.* at 489, 621-22. The Fourth Circuit in this case considered it significant that *Wide Awake* has a cross printed on each page. Pet. App. 8a. Each page of William Lloyd Garrison's abolitionist paper, *The Emancipator*, had a cross and a biblical quotation at the top.

Antebellum southern states attempted to suppress speech and publications critical of slavery, and passed resolutions demanding that northern states do the same. *See* M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 28-50 (1986); Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1713-17 (1991); Nelson, at 533-34. Several states criminalized abolitionist speech or banned members of abolitionist societies from their jurisdiction. *See, e.g.*, 1820 S.C. Acts 22-23; 1804 Ga. Laws 5-6; 1802 N.C. Sess. Laws 12-13. A Virginia statute, for example, provided:

> That any member of an abolition or anti-slavery society, or agent of an abolition or anti-slavery society, who shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery, shall be deemed guilty. . . .

1836 Va. Acts 44. The Virginia statute required the postmaster to report publications or writings denying the right of masters to their slave property, and abolitionist literature detected in this manner was to be burned in the presence of the justice of the peace. *Id.* The *New York Tribune*, for instance, was banned by a Virginia postmaster under this law in 1859. Curtis, at 30-31.

Another effective tool of ideological suppression was mob violence and intimidation, undeterred by the police powers of the states. The Reverend Elijah Lovejoy, for example, edited the *Observer*, a weekly religious publication dedicated to anti-slavery ideals. After a St. Louis mob destroyed his office, he moved to Alton, Illinois. Lovejoy's press was repeatedly destroyed by angry pro-slavery crowds in Illinois. Finally, a mob set fire to the building containing his press. As Lovejoy fled the burning building, he was fatally shot in the chest. The mayor claimed the crowd was too strong to control. 1 H. Wilson, *History of the Rise and Fall of the Slave Power in America* 374-82 (1872).

Religious abolitionists shared the fundamental tenet that, as natural rights, the civil liberties enumerated in the Constitution should be applied to the states as well as the federal government. Graham, at 491-93. Many Republicans were heavily influenced by the religious movement for abolition, and shared the premise that the Bill of Rights should bind the states. Political leaders of the era who were converted by the abolitionist movement included Joshua Giddings, Salmon P. Chase and Thaddeus Stevens. *Id.* at 493. Evangelical anti-slavery strongholds in Ohio, New York and Pennsylvania elected such leading Republicans as John Bingham (drafter of section 1 of the Fourteenth Amendment), Philomen Bliss, William Lawrence, Giddings and others to serve in Congress prior to and during the Reconstruction. *Id.* at 492-93, 622-23. An 1856 Republican Party campaign slogan called for "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont." Amar, at 1276.

As the war neared an end, Representative Kasson noted that "the three great ecclesiastical bodies of this country, the Methodist, Presbyterian, and Baptist" had condemned slavery, "and that opposition has run through

nearly all the ecclesiastical organizations of the country ever since." The institution of slavery, however, "suppresses freedom of speech and of the press." "Who does not know that innocent ladies, cultivated, intelligent, Christian women, have been driven from the cities and States of the South. . .because they dared to say something offensive to this intolerant spirit of slavery?" Cong. Globe, 38th Cong., 2d Sess. 193 (1865). Congressman Ashley related that slavery "has for many years defied the Government and trampled upon the national Constitution. . . . It has silenced every free pulpit within its control." *Id.* at 138.

The southern history of suppressing abolitionists' speech was a significant concern of the Reconstruction Congress, and the protection of such religious expression was an important impetus in the framing of the Fourteenth Amendment. During debates over the post-war amendments, Congressman Price stated that "for the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State." Cong. Globe, 39th Cong., 1st Sess. 1066 (1866). Congressman Moulton offered a synopsis of the suppression of civil liberties in the states. "There is neither freedom of speech, of the press, or protection of life, liberty, or property." *Id.* at 1617. *See also* Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (remarks of Rep. Orth); Cong. Globe, 38th Cong., 1st Sess. 2615 (1864) (remarks of Rep. Morris); Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871) (remarks of Rep. Bingham).

It is settled law that the Fourteenth Amendment created a constitutional mandate that states adhere to the protections of the Bill of Rights. The abolitionist background leading up to the Fourteenth Amendment suggests that a particularly high constitutional value should be placed on the right of religious individuals to freely

express their views. Just as with the history of the First Amendment, the Fourth Circuit's decision again subverts constitutional history by holding that the Religion Clause imposes special disabilities on religious expression.

III. The Fourth Circuit's Decision Will Impoverish Discourse at Public Universities

One unfortunate consequence of the Fourth Circuit's ruling is that it will tend to isolate students from the expression of religious viewpoints on public issues. Religious discourse has played an enormously significant role in our nation's history and in the resolution of many of our most important controversies. The public university is intended to be a marketplace of ideas. *Healy v. James*, 408 U.S. 169, 180 (1972). By discriminating against student religious speech, the University of Virginia imposes a secularism on the student body that impoverishes campus debate.

From the birth of our nation, religious ideas have played a critical role in our national biography. Religious expression played a significant part in motivating colonists to join the struggle for independence. Historian Arthur M. Schlesinger notes that, along with lawyers, "the clergy provided the most articulate spokesmen for the cause." A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 10 (Northeastern ed., 1980) (1957). Traditional days of fasting and thanksgiving, in the words of British General Gage, provided "an opportunity for Sedition to flow from the Pulpits." *Id.* at 31-32. New England Congregational ministers "'represented the cause of America as the cause of heaven,' or, as a British sympathizer said, they sounded 'the Yell of Rebellion in the Ears of an ignorant & deluded People.'" *Id.* at 11. Presbyterian clerics in the Middle colonies "proclaimed similar doctrines." *Id.*

In an 1818 letter, John Adams identified Doctor Jonathon Mayhew as "[a]nother gentleman, who had great influence in the commencement of the Revolution." Rossiter, at 228. For instance, in a sermon against *Unlimited Submission*, Mayhew laid out circumstances in which Christians are not obliged to obey the government. *Id.* at 240. Likewise, John Witherspoon, a Presbyterian minister and president of the College of New Jersey (Princeton), "besides writing for the newspapers, became a member of the Second Continental Congress and signed the Declaration of Independence." Schlesinger, at 12.

The role of religious expression in the abolitionist movement has been documented above. Abraham Lincoln similarly filled his speeches with biblical quotations and allusions. *See* G. Wills, *Under God: Religion and American Politics* 207-21 (1990). In one speech, Lincoln speculated that the Civil War was God's judgment on both North and South for the sin of slavery. *Id.* at 218. In the Gettysburg Address, Lincoln drew on New Testament imagery, expressing the desire "that this nation, under God, shall have a new birth." *Id.* at 212.

As a nation, we now celebrate annually the birth of a clergyman. 5 U.S.C. § 6103. The Reverend Martin Luther King, Jr., head of the Southern Christian Leadership Conference, acknowledged the religious roots of the movement for civil rights:

> From the beginning a basic philosophy guided the movement. This guiding principle has since been referred to variously as nonviolent resistance, noncooperation, and passive resistance. But in the first days of the protest none of these expressions was mentioned: the phrase most often heard was "Christian love." It was the Sermon on the Mount, rather than a

> doctrine of passive resistance, that initially inspired the Negroes of Montgomery to dignified social action. It was Jesus of Nazareth that stirred the Negroes to protest with the creative weapon of love.

A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 16 (J. Washington ed., 1986); *id.* at 17 ("Christ furnished the spirit and motivation, while Gandhi furnished the method."). Before the Lincoln Memorial in Washington, D.C., Dr. King shared his "dream" of the millennial Kingdom, where "every valley shall be exalted, every hill and mountain shall be made low, the rough places shall be made plain, and the crooked places shall be made straight and the glory of the Lord will be revealed and all flesh shall see it together." *Id.* at 219; Wills, at 203-04.

Numerous other instances could be cited in which our national dialogues have been conducted in explicitly religious terms. These are not simply historical curiosities from a more religious past, but rather reflect an ongoing fact of our communal life. The President recently delivered a sermon in favor of his crime bill at a Maryland church, *New York Times*, Aug. 15, 1994, at A12, and black church leaders have been encouraged to preach about the need for health care reform, *New York Times*, Aug. 24, 1994, at A10.

There is nothing untoward about permitting religious discussion as part of the debate on public university campuses. As former Judge Arlin Adams of the Third Circuit has explained:

> Although the Founders represented a spectrum of views, they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they

> did not envision a secular society, but rather one receptive to voluntary religious expression.

A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 31 (1990). *See id.* at 21 (George Washington), 25 (James Madison), 27 (John Adams).

The Fourth Circuit's decision veers from the religious pluralism of the Founders toward a relentlessly secular society, where religious expression is frowned upon and religious persons are denied the privileges afforded other citizens. Rather than promoting free and open exchange in the marketplace of ideas, the court encourages students to hide the religious bases for their opinions, or leave them unexamined. University students will be less likely to encounter religious perspectives on issues such as racism, crisis pregnancy, homosexuality and the relative morality of capitalism and socialism—all addressed by *Wide Awake*, Pet. App. 6a-7a—even though religious perspectives may play a significant role in dealing with those very issues outside the university context. If religious voices are heard at the University of Virginia, under the Fourth Circuit's ruling, it will be from denominations wealthy enough to supply the funding the school discriminatorily denies. Inevitably, students will graduate with a hollower education than they might have had.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit be granted.

Steven T. McFarland
Counsel of Record
Edward M. Gaffney, Jr.
Samuel B. Casey
J. Randy Beck

APPENDIX
Statements of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the Framers' notion of human freedom. The state has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and nonnegotiable prohibition

attached to this, our First Freedom, is "Congress shall make no law. . . ."

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics -- lay and clergy alike -- to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of all Americans and is thus prepared to defend those rights in court.

The Southern Baptist Convention (SBC) is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. **The Christian Life Commission (CLC)** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

The Church of Jesus Christ of Latter-Day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 9 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let

them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-Day Saints.

Family Research Council (FRC) conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

No. 94-329

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,
v.
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

MICHAEL W. MCCONNELL *
ALAN UNTEREINER
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400, ext. 102
Counsel for Petitioners

* Counsel of Record

JAMES J. MINGLE *
General Counsel
University of Virginia
Madison Hall — P.O. Box 9015
Charlottesville, VA 22906
(804) 924-3586

JOHN C. JEFFRIES, JR.
Professor, School of Law
University of Virginia
North Grounds
Charlottesville, VA 22903
(804) 924-3436
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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* * * *

Counsel for petitioners and counsel for respondents have jointly agreed to lodge twelve sets of *Wide Awake* Magazine (each set containing three issues of the magazine) with the Court.

Counsel for petitioners have separately lodged 20 copies of *Al-Salam* magazine with the Court.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/11/91	COMPLAINT.
08/30/91	ANSWER by defts. (notice mailed 9-9-91)
08/30/91	MOTION TO DISMISS by defts.
09/30/91	Plaintiffs MEMO of Points and Authorities in Opposition To defts. Motion To Dismiss.
11/12/91	PLAINTIFFS MOTION FOR SUMMARY JUDGMENT.
11/12/91	PLAINTIFFS STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE.
11/12/91	MEMO OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT.
11/12/91	AFFIDAVIT OF RONALD W. ROSENBERGER.
11/12/91	EXHIBITS TO MEMO OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT.
01/17/92	DOCUMENTARY APPENDIX TO DEFTS. SUMMARY JUDGMENT MEMO.
01/17/92	DEFTS. MEMO OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFTS. CROSS MOTION FOR SUMMARY JUDGMENT.
01/17/92	DEFTS. MOTION FOR SUMMARY JUDGMENT.
01/27/92	PLAINTIFFS REPLY TO DEFTS. CROSS MOTION FOR SJ AND TO DEFTS. OPPOSITION TO PLAINTIFFS MOTION FOR SUMMARY JUDGMENT.
05/20/92	MEMORANDUM OPINION.

DATE	PROCEEDINGS
05/20/92	ORDER ent. wherein it is ADJUDGED AND ORDERED that plaintiffs' motion for summary judgment is denied; defts.' cross motion for summary judgment is granted and this case is dismissed and stricken from the docket of the court. (Entry date: 05/21/92).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil No. ———

RONALD W. ROSENBERGER, as a member of WIDE AWAKE PRODUCTIONS, an unincorporated Contracted Independent Organization of the University of Virginia, and other student groups similarly situated, and as the Editor-in-Chief of WIDE AWAKE MAGAZINE, and GREGORY W. MOURAD, ROBERT J. PRINCE, and other students of the University of Virginia similarly situated,

v.

Plaintiffs,

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, EDWARD E. ELSON, W.L. LYONS BROWN, JR., ROBERT G. BUTCHER, JR., N. THOMAS CONNALLY, M.D., HOVEY S. DABNEY, WALLER H. HORSLEY, J. THOMAS HULVEY, M.D., EVANS B. JESSEE, PATRICIA M. KLUGE, ARNOLD H. LEON, LEIGH B. MIDDLEDITCH, JR., ELIZABETH D. MORIE, FREDDIE W. NICHOLAS, SR., S. BUFORD SCOTT, JESSE B. WILSON, III, THOMAS E. WORRELL, JR., ADAM S. ARTHUR, ALEXANDER G. GILLIAM, JR. in their capacities as members of THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, RONALD J. STUMP in his capacity as Associate Dean of Students of the University of Virginia and Chairperson of the Student Activities Committee of the University of Virginia,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

Plaintiffs allege and verify as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is a civil action for declaratory and injunctive relief and for damages and attorneys' fees arising from defendants' violation of plaintiffs' constitutional and civil rights and liberties under the United States and Virginia constitutions and under federal and Virginia law.

2. Plaintiffs, RONALD W. ROSENBERGER, as a member of WIDE AWAKE PRODUCTIONS, an unincorporated Contracted Independent Organization ("CIO") of the University of Virginia, and as the Editor-in-Chief of WIDE AWAKE MAGAZINE, and ROBERT J. PRINCE and GREGORY W. MOURAD, and other past and present students of the University of Virginia similarly situated ("Plaintiffs"), seek:

A. a declaration that the conduct of the various named defendants in establishing and applying a policy for the University of Virginia, the Rector and Visitors of the University of Virginia, the Student Council of the University of Virginia, and the Appropriations Committee of the Student Council, which denies to plaintiffs the same benefits (including, but not limited to, eligibility to receive Student Activities Fund ("SAF") monies) granted other similarly situated students and student organizations, and which denies plaintiffs Student Activities Fund benefits solely and expressly because of the content or viewpoint of plaintiffs' speech, violates plaintiffs' rights to freedom of speech, freedom of association, freedom of the press, free exercise of religion, and to equal protection under the law, as guaranteed by the First and Fourteenth Amendments to the United States Constitution; by Article I, Sections 11, 12 and 16 of the Virginia Constitution; and by the Virginia Act for Religious Freedom, Code of Virginia Title 57, Chapter 1, Sections 57-1 and 57-2;

B. a declaration that the above-described conduct of the various named defendants denies plaintiffs their federal civil rights under color of state law in violation of Chapter 22, Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 (1988);

C. a permanent order enjoining defendants from continuing and applying a policy of discriminating against plaintiffs in the appropriation of Student Activities Fund benefits or in any other manner on the basis of the content or viewpoint of plaintiffs' speech or on the basis of the content or viewpoint of the speech of the Contracted Independent Organization of which plaintiffs are members or of the journals, magazines, newsletters or other things that plaintiffs publish or may publish in the future;

D. such compensatory damages for violation of plaintiffs' federal and state constitutional and statutory rights as the Court may find just and proper, including but not limited to $5,862.00, the sum of the SAF funds unlawfully denied plaintiffs, plus interest thereon from the date of such denial;

E. an order awarding plaintiffs reasonable costs and attorneys' fees pursuant to Section 2 of the Civil Rights Attorney's Fees Award Act of 1976, as amended, 42 U.S.C. § 1988 (1988); and

F. such other relief as the Court deems just and proper.

JURISDICTION

3. This action arises under the First and Fourteenth Amendments to the United States Constitution. Jurisdiction over the claims is conferred on this Court by 28 U.S.C. §§ 1331 and 1343 and by 42 U.S.C. §§ 1983 and 1988. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202. This Court has pendent jurisdiction over the state constitutional and statutory claims.

Constitution

Article I: *Name.* C. S. Lewis Society

Article II: *Purpose.* To promote interest in and discussion of, various literary, moral, and philosophical topics, with a particular emphasis on the work of the "Oxford Christians."

Article III. *Membership.* The C. S. Lewis Society does not discriminate on the basis of race, color, creed, national origin, affectional orientation, or sex. It is open to students, faculty members, and townspeople.

Article IV: *Officers.* John Stinneford, President. As this is a new organization, other positions and/or a managing committee will be set up at an organizational meeting in the fall.

Article V: *Elections.* Positions within the organization will be determined by a vote of the general membership.

Article VI: *Meetings.* The group will tentatively meet weekly on Sunday evenings.

Article VII: *Finances.* Members of the group may be expected to pay a nominal membership fee, and will be expected to help in any Fundraising activities. Authority for expenditure of the Funds shall reside in a majority vote of the organization officers.

Article VIII: *Amendments.* The Constitution may be amended by vote of the club membership.

(1)

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

MICHAEL W. MCCONNELL *
ALAN E. UNTEREINER
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400, ext. 102
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners:

Ronald W. Rosenberger, as a member of Wide Awake Productions and as Editor-in-Chief of *Wide Awake* magazine; Gregory W. Mourad; and Robert J. Prince.

Respondents:

The Rector and Visitors of the University of Virginia; Edward E. Elson; W.L. Lyons Brown, Jr.; Robert G. Butcher, Jr.; N. Thomas Connally, M.D.; Hovey S. Dabney; Waller H. Horsley; J. Thomas Hulvey, M.D.; Evans B. Jessee; Patricia M. Kluge; Arnold H. Leon; Leigh B. Middleditch, Jr.; Elizabeth D. Morie; Freddie W. Nicholas, Sr.; S. Buford Scott; Jessie B. Wilson, III; Thomas E. Worrell, Jr.; Adam S. Arthur; Alexander G. Gilliam, Jr.; and Ronald J. Stump.

Wide Awake Productions is an unincorporated Contracted Independent Organization of the University of Virginia which publishes *Wide Awake* magazine. It has no parent companies or subsidiaries. Petitioners make this declaration pursuant to Supreme Court Rule 29.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-42a) is reported at 18 F.3d 269. The decision of the District Court (Pet. App. 43a-58a) is reported at 795 F. Supp. 175.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1994. A timely petition for rehearing with a suggestion for rehearing in banc was denied on May 23, 1994. See Pet. App. 59a-60a. This Court issued a writ of certiorari on October 31, 1994. This Court's jurisdiction is under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND UNIVERSITY GUIDELINES INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, this case involves the University of Virginia Student Activity Fee Statement of Purpose and Funding Guidelines, which are set forth in full at Pet. App. 61a-67a.

STATEMENT OF THE CASE

This case involves the refusal of the University of Virginia to subsidize the printing costs of a student publication, called *Wide Awake*, solely and expressly because the viewpoint articulated in the publication is religious. The court below agreed with the students that the University regulation forbidding funding of religious activities "places a presumptively unconstitutional condition upon access to government benefits in violation of the Free Speech and Press Clause of the First Amendment," but held that this presumptively unconstitutional discrimination is required by the Establishment Clause. Pet. App. 39a. The facts are uncontested.

A. The Student Activities Fund

Through its Student Activities Fund ("SAF" or "Fund"), the University of Virginia supports a "wide variety of student organizations, activities, and publications." Pet. App. 2a. In the academic year 1990-91 (when this case arose) the University provided funds to 118 student groups, including some 15 student-written and -edited newspapers and magazines, representing a broad range of interests and perspectives. *Id.* at 4a. The Fund is financed by a mandatory student activities fee of $14 per semester, paid by each full-time student. Petitioners, like other students, are required to contribute to this fund.

Respondents, the Rector and Visitors of the University, exercise legal control and authority over the operation of the Fund. Pet. App. 3a; See Va. Code Ann. § 23-69,

et seq. (1950). Respondents have delegated authority to allocate SAF monies to the Student Council, an elected student body, subject to review by the University's Student Activities Committee. The decisions of both bodies must be made in accordance with Guidelines established by respondents, which are reproduced at Pet. App. 61a-67a. This case is a constitutional challenge to one provision of those Guidelines.

To qualify for funding, a student group must first attain the status of a "Contracted Independent Organization" ("CIO"). CIO status is available to any group that is composed in its majority of students, is managed by officers who are full-time students, keeps an updated copy of its constitution on file with the University, and pledges in writing not to discriminate. Pet. App. 2a. CIOs are given access to University facilities, including meeting rooms and computer terminals, and have the right to apply for student activity funds. According to the standard CIO agreement, benefits provided to student groups by the University "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities." J.A. 26, see Pet. App. 2a-3a.

The Guidelines specify eleven categories of student activity that are eligible for funding, as well as certain activities and types of organization that are excluded from eligibility. Among the categories of student activity that "[t]he Rector and Visitors have determined * * * relate to the educational purpose of the University and thus are eligible for funding," are "student news, information, opinion, entertainment, or academic communications media groups." Pet. App. 61a. The Guidelines prohibit the funding of religious organizations, fraternities, sororities, honor societies, political organizations, and organizations whose membership is exclusionary. A "religious organization" is defined as "an organization whose purpose is to practice a devotion to an acknowledged ulti-

mate reality or deity." *Id.* at 66a. The Guidelines also prohibit funding for the following purposes: religious activities, payment of honoraria or similar fees, social entertainment or related expenses, philanthropic contributions and activities, political activities, or activities that would jeopardize the University's tax exempt status. *Id.* at 62a-63a. The "religious" exclusion is the only explicitly viewpoint-based ground for exclusion from the program.[1]

Once an activity is deemed eligible for funding, the Guidelines prescribe the following criteria for allocating funds among eligible organizations: the size of the group, the University-wide benefit of the group's activities, and the group's financial self-sufficiency. Pet. App. 63a; *id.* at 4a. After an organization is approved for funding, it submits expense vouchers to the Fund, which are paid only upon a determination that the particular expense is eligible for reimbursement. Funds do not go directly to the group. Pet. App. 4a.

During the academic year 1990-91, 343 student organizations qualified as CIOs, of which 135 applied for, and 118 received, student activity funds. Pet. App. 4a. Among the funded organizations were issue-oriented and potentially controversial groups, such as the Gandhi Peace Center, the Federalist Society, Students for Animal Rights, the Lesbian and Gay Student Union, and Student Alliance for Virginia's Environment. J.A. 65. Fifteen publications, representing a wide range of differing per-

[1] The Guidelines prohibit both "religious activities" and "political activities" (Pet. App. 62a, 63a), but the difference in definitions is striking and illuminating. The Guidelines define as a "religious activity' any activity that "promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." Pet. App. 66a. By contrast, the Guidelines state that the "restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which * * * espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." Pet. App. 65a-66a. Thus, the University avoids viewpoint discrimination in its definition of "political activities" but not in its definition of "religious activities."

spectives on issues of concern to the student body, received funding. These included *The Declaration, Dialogue Magazine*, the *Journal of Law and Politics, Loki Science Magazine, Oculus, Seasons, Thoughtlines*, the *University Journal*, the *Virginia Advocate*, the *Virginia Environmental Law Journal*, the *Virginia Literary Review*, and the *Yellow Journal*. Pet. App. 4a n.3. The record shows that the University funds student organizations that "express a variety of ideological viewpoints, including but not limited to viewpoints which are inconsistent with or antagonistic to various religious beliefs." J.A. 38 ¶ 16.

Among the funded organizations in 1990-91 were the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society. Pet. App. 4a. The Muslim Students Association Constitution identifies the group's purpose as "to promote a better understanding of Islam to the University Community." J.A. 92. Using SAF funds, it publishes a magazine entitled *Al-Salam*, which presents an Islamic viewpoint on issues of world affairs and culture and contains, among other things, discussions of Islamic doctrine.[2] The Jewish Law Students Association By-Laws state that its purposes are "[t]o encourage Jewish law students to participate in Jewish activities" and to "be a focal point for Jewish activities at the Law School." J.A. 97. The Constitution of the C.S. Lewis Society states that the purpose of the organization is to "promote interest in and discussion of, various literary, moral, and philosophical topics, with a particular emphasis on the work of the 'Oxford Chris-

[2] See, *e.g.*, A. Azfar, "When language presents a trial of faith," 1 *Al-Salam* 5 (Feb. 1992) (quoting extensively from the Quran and containing such doctrinal statements as: "the ideal speech in Islam is that which is marked by the frequent remembrance of God, speech that would infuse our hearts with the presence of the divine"); I. Saeed, "The pillars that support Islam," 1 *Al-Salam* 6 (Feb. 1992) (discussing the five doctrinal foundations of Islamic religious practice: the Declaration of Faith (*Shahada*), prayer (*salat*), fasting during the holy month of Ramadan (*sawm*), charity (*zakat*), and pilgrimage to Mecca (*Hajj*)). Copies of this issue of *Al-Salam* have been lodged with the Court.

tians.'" J.A. 104. The University has stated that these organizations were funded not as "religious activities," but as "cultural activities." J.A. 21.[3]

B. Wide Awake Productions

In September 1990, petitioner Ronald W. Rosenberger, an undergraduate student at the University of Virginia, joined with other University of Virginia students to form Wide Awake Productions. Wide Awake Productions is an unincorporated association with the stated purposes of (1) "publish[ing] a magazine of philosophical and religious expression," (2) "facilitat[ing] discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and (3) "provid[ing] a unifying focus for Christians of multicultural backgrounds." J.A. 67, Pet. App. 5a. Wide Awake Productions publishes *Wide Awake: A Christian Perspective at the University of Virginia.* According to the editor's statement in the first issue, the magazine was started when the founders "realized that none of the fifteen student-run publications at the University provided a forum for Christian expression, and we decided to fill that void." J.A. 45. Wide Awake Productions is not affiliated with any religious institution or denomination, and it allows any University student to join, without regard to sex, race, color, or religion. Pet. App. 6a.

As of June 1992, the group had published three issues of the magazine, which are distributed free of charge to about 5,000 students on the campus of the University of Virginia. These issues form part of the record in this

[3] An organization named Black Voices, which performs gospel music, was funded in 1990-91. During the fall of 1990, the Associate Dean of Students met with the group's leader and questioned him about "the group's activities and whether they were religious." Because the group "now were praying at practices and encouraging members to be more of a model of faith," the leader told the Associate Dean that "the group as a whole was going to make a decision." Later that year, the group decided to retain its religious identity, and accordingly did not apply for SAF funding. Affidavit of Ronald J. Stump, ¶¶ 15-16, J.A. 73.

case and have been circulated to the Court. As described in the editor's statement in the first issue, *Wide Awake* "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." *Wide Awake*, Nov./Dec. 1990, at 2; see J.A. 45. The lead cover story in the first issue was on the subject of racism. Other articles dealt with such subjects as crisis pregnancy, fear of airplane travel, and C.S. Lewis's philosophy. The issue also contained a lengthy interview with a professor of economics at the University and a commentary on Biblical passages regarding the abundant life. The featured article in the second issue was entitled "Homosexuals: Can They Change . . . and Should They?" It also included an interview with a professor of mathematics at the University and articles about the problem of evil and free will, the importance of foreign missions, and the meaning of a passage in the Gospel of *John*. *Wide Awake*, Mar./Apr. 1991. The third issue contained articles on eating disorders (entitled "From Calorie to Calvary"), a popular Christian musician, papal teaching on Marxism and the free market, an Augustinian perspective on university pedagogy, and an alumnus's observations on recent developments in Eastern Europe, based on his experiences as a missionary in Moldavia. *Wide Awake*, Sept./Oct. 1991. All of the issues contained book and music reviews and essays about aspects of student life; one included original poetry.

Petitioners do not dispute that *Wide Awake* constitutes a "religious activity" within the meaning of the Guidelines. Pet. App. 7a. As the Court of Appeals noted, the magazine is marked by "unflagging invocation of religious, specifically Christian, themes" and "[t]he journal's pages are pervasively devoted to providing a 'Christian perspective' in printer's ink at the University of Virginia." *Id.* (footnote omitted).

C. The University's Refusal To Fund Wide Awake

Soon after its founding, Wide Awake Productions attained CIO status. It is undisputed that it conformed to all applicable, content-neutral funding eligibility requirements, as set out in the Guidelines, other than the prohibition relating to "religious activities." Specifically, *Wide Awake* falls within the eligibility category of "student news, information, opinion, entertainment, or academic communications media groups." J.A. 61a ¶ 4. In January 1991, the organization submitted an application for funding in the amount of $5,862, to cover publishing costs.

On February 26, after examining the content of the first issue of the magazine, the Appropriations Committee of the Student Council denied petitioners' request. There is no dispute that the Appropriations Committee's decision was based solely on the content of the publication. Petitioners were sent a letter explaining the basis for the decision:

> In reviewing the request by Wide Awake Productions, the . . . Committee determined your organization's request could not be funded as it is a religious activity. This determination was made after reviewing your first issue of *Wide Awake*. In particular, the committee noted in your Editor's Letter that the publication was 'a forum for Christian expression' and a means 'to challenge Christians (in how) to live.'

Pet. App. 8a-9a, J.A. 54. As the letter indicates, the sole basis for denial was that *Wide Awake* is a "religious activity," and the sole basis for the determination that *Wide Awake* is a "religious activity" was the content of the magazine. At no point has the University claimed that Wide Awake Productions has failed to satisfy any other prerequisite for eligibility for funding.

Wide Awake Productions appealed the denial to the full Student Council on March 3, 1991. It contended that the magazine met all applicable funding guidelines and

that the Appropriations Committee's denial of funding on the basis of its religious perspective violated the Constitution. The Student Council denied the appeal and affirmed the Committee's decision without further comment. Pet. App. 9a.

Wide Awake then appealed to the Student Activities Committee, a University committee. On April 16, 1991, in a letter signed by respondent Ronald J. Stump, Associate Dean of Students, the Committee affirmed the denial of funding. Stump wrote:

> After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake Productions and by [the] Student Council, the Committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from [the Appropriations Committee].

Pet. App. 9a, J.A. 55. This exhausted all internal avenues of appeal within the University.

D. Proceedings in District Court

Wide Awake Productions, *Wide Awake*, and three of its editors and members ("petitioners") then filed suit in federal district court, pursuant to 42 U.S.C. § 1983, challenging the University's denial of funding on the basis of the religious viewpoint of their publication. They claimed that the University's categorical exclusion of otherwise eligible student publications, solely on the basis of religious perspective, violated their rights to freedom of speech and press, to free exercise of religion, and to equal protection of the law.[4] They sought declaratory and in-

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[4] Petitioners also raised issues under Article I of the Constitution of Virginia and the Virginia Act for Religious Freedom, Va. Code Ann. §§ 57-1 to -2, but did not pursue those state law claims on appeal. Pet. App. 15a.

junctive relief prohibiting the University from denying funding on the basis of the content or viewpoint of their publication, and compensatory damages of at least $5,862, representing the sum requested and denied for the first year of publication. J.A. 17. Respondents filed an Answer maintaining, among other things, that the University is legally prohibited, under the Establishment Clause, from providing financial assistance to "religious activities" such as *Wide Awake* magazine. J.A. 20, 23-24. The parties filed cross-motions for summary judgment, and agreed, with minor exceptions,[5] that there were no disputed issues of material fact and that the case was ripe for summary disposition.

On May 20, 1992, the district court granted respondents' motion for summary judgment and denied petitioners'. The court held, *inter alia*, that application of the Guideline barring any funding of "religious activities" did not result in impermissible viewpoint or content discrimination against petitioners' speech. Pet. App. 54a. While declining to decide whether the Establishment Clause would force the University to deny funding for petitioners' magazine, the court found that the University's "fear" of violating the Establishment Clause was a sufficient justification for the Guideline:

> [E]ven if the plaintiffs were correct in their assertion that funding Wide Awake would not violate Federal or State law, it is not the province of this court to second guess the legal judgments made by the University. So long as the University's Establishment Clause fears are reasonable, the Guideline restriction must stand. Given the complexity of the law in this regard, this court has little trouble in finding that the Guideline restriction is a reasonable limit to access to SAF funds. Further, the restriction is a reasonable

[5] Those exceptions had to do with whether, in addition to denying funding, the University refused *Wide Awake* access to certain University facilities. The district court ruled against petitioners on this claim (Pet. App. 53a n.8), and they did not pursue it on appeal.

> response by the University to prevent excessive entanglement with religion.

Ibid. The district court rejected petitioners' free exercise claim on the ground that it did not appear to the court that "any burden of constitutional magnitude" had been imposed on them, and that even if there were a burden on free exercise rights, it would be justified by the compelling state interest of avoiding violation of the Establishment Clause. *Id.* at 55a, 57a.[6] The court rejected petitioners' equal protection claim on the ground that they had made no showing of discriminatory intent. *Id.* at 57a-58a.

E. Proceedings in the Court of Appeals

The Court of Appeals reversed the district court's holding that the Guideline against funding "religious activities" does not discriminate on the basis of the content and viewpoint of the publication, but it affirmed the judgment on the ground that the University has a compelling state interest in avoiding a violation of the Establishment Clause.

The Court of Appeals explained that in "forbidding funding for speech that meets the definition of 'religious activity,' but not for speech of other types, the SAF guidelines discriminate among speech on the basis of its content." Pet. App. 26a. This, the court held, is "presumptively unconstitutional." *Id.* at 39a. Although the government has no affirmative duty to subsidize exercise of a constitutional right, it may not "penalize exercise of constitutional rights by withholding from their possessors an otherwise discretionary benefit." *Id.* at 25a. The Guideline "constitutes precisely such a penalty, because it restrains Wide Awake Productions from gaining access altogether to a funding source generally available to CIOs not engaged in religious expression." *Ibid.* It "thus cre-

[6] At this point in the opinion, the district court did not explain why it concluded that funding the magazine would violate the Establishment Clause. Earlier in the opinion, it had declined to decide that question. Compare Pet. App. 54a with *id.* at 57a.

ates an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression." *Id.* at 26a. "[A]bsent considerations of equal constitutional dignity," the Court of Appeals explained, the Guideline violates the constitutional principle that "when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner." *Id.* at 25a.

The court concluded, however, that the University's discrimination against religious speech is justified by its "compelling interest in maintaining strict separation of church and state," which is "derive[d]" from the Establishment Clause. Pet. App. 26a-27a, 39a. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the court held that inclusion of student publications within the program funded by the Student Activities Fund would violate the "effect" and "entanglement" prongs of the test. The court ruled that inclusion of "a publication so clearly engaged in the propagation of particular religious doctrines" would constitute a "patent Establishment Clause violation." Pet. App. 35a; see *id.* ("it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief").

Moreover, it was the "entanglement" part of the *Lemon* test that the court found to be "most plainly implicated by this case." Pet. App. 35a. The court acknowledged that state universities "may not discriminate against [religious groups] based on the content of their speech" when "university *facilities*" are involved, but opined that "[d]irect monetary subsidization of religious organizations and projects * * * is a beast of an entirely different color." *Id.* at 37a (emphasis in original). According to the court, "providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake*'s Christian mission." *Ibid.* It would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Id.* at 38a. Moreover,

"[t]he possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the University of Virginia," which the court stated is "a factor of recurring significance in the Supreme Court's jurisprudence surrounding *Lemon*'s 'excessive entanglement' prong." *Id.* at 37a.

In sum, the court of appeals held: (1) that the Speech and Press Clauses "presumptively" forbid discrimination against an otherwise eligible publication on the basis of its religious viewpoint, (2) that the Establishment Clause requires such discrimination, and—implicitly—(3) that the Establishment Clause trumps the Speech and Press Clauses. The court also affirmed the lower court's disposition of petitioners' free exercise and equal protection claims.

Petitioners filed a petition for rehearing with suggestion for rehearing in banc. The petition was denied on May 23, 1994, Judges Widener, Niemeyer, and Luttig dissenting.[7]

SUMMARY OF ARGUMENT

This case involves the discriminatory exclusion of an otherwise qualified student publication from eligibility for student activity funding at the University of Virginia, solely on the basis of the content, indeed the viewpoint, of the publication.

The University of Virginia uses its Student Activity Fund to support a wide variety of student speech from different perspectives, including some 15 newspapers and magazines. Petitioners have started a sixteenth: *Wide Awake*, a student magazine that addresses national and campus issues of a political, personal, cultural, and edu-

[7] There is no suggestion of mootness. Even apart from petitioners' claim for damages, which obviously is not moot, Wide Awake Productions still exists, wishes to continue publishing, and seeks to participate in the Student Activities Fund.

cational nature from the point of view of its editors and members. They have satisfied all the necessary requirements for funding eligibility. The problem is their editorial point of view, which is rooted in their Christian religious faith. That (and that alone), according to the University, makes the magazine ineligible for funding. This raises the question: is the religious perspective of a student publication a lawful ground for excluding it from benefits otherwise available to organizations of its type?

We contend that the University's action violates the First and Fourteenth Amendments of the United States Constitution. Our argument is based on two important principles of constitutional law. First, discrimination on the basis of the content of speech, and especially its viewpoint, is presumptively unconstitutional and can be justified only on the basis of a compelling governmental purpose for the discrimination. *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2542-43, 2547-48, 2549-50 (1992). This principle applies to decisions involving benefits as well as regulation (*FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987)), and to religious as well as secular points of view (*Lamb's Chapel* v. *Center Moriches School Dist.*, 113 S. Ct. 2141 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 269-70 (1981)). Second, the nondiscriminatory funding of a broad range of publications and activities, without regard to their religious, antireligious, or nonreligious point of view, does not violate the Establishment Clause. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989); *Witters* v. *Washington Dep't of Services*, 474 U.S. 481 (1986).

ARGUMENT

I. THE SPEECH AND PRESS CLAUSES FORBID A PUBLIC UNIVERSITY FROM DENYING FUNDING TO AN OTHERWISE ELIGIBLE STUDENT PUBLICATION SOLELY BECAUSE OF ITS RELIGIOUS VIEWPOINT

Few propositions are more central to American constitutional law: in the absence of compelling justification, the government must not discriminate against or deny a benefit to a person because of the content of his speech. This Court has made clear that content-based discrimination against speech is "presumptively invalid" (*R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2542 (1992)) and subject to "the most exacting scrutiny" (*Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994)). "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster* v. *New York Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). The prohibition is particularly strong when the government's action "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V.*, 112 S. Ct. at 2547. See *Boos* v. *Barry*, 485 U.S. 312, 319 (1988); *Schacht* v. *United States*, 398 U.S. 58 (1970). "The general principle * * * is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

In accordance with these principles, the lower courts have consistently held (and neither the Fourth Circuit nor the University disputes) that public universities may not deny funding to student groups or publications on the basis of their viewpoint. The leading case is *Gay & Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 361 (8th Cir. 1988), in which the University of Arkansas refused to allow a student gay rights group to receive funds from the student activities fund. The Eighth Circuit (Arnold,

J.) stated the following constitutional principle, which we commend to this Court as equally applicable to this case:

> [W]e hold that a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed.

Id. at 362.

Similarly, in *Joyner* v. *Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the court held that public university officials may not use "the institution's power of the purse" to regulate the content of student publications. In that case, the university president cut off funding of a student newspaper because of its advocacy of black separatism, which he considered "abhorrent, contrary to the university's policy, and inconsistent with constitutional and statutory guarantees of equality." *Id.* at 462. The court described the president's action as "censorship" and held that it violated the First Amendment. "Censorship of constitutionally protected expression cannot be imposed," the Court said, by "withdrawing financial support" for a student publication or by any other means. *Id.* at 460.[8] See also *Brooks* v. *Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969) (public university may not deny funding to an anti-war speaker on account of the controversial character of his views).[9]

[8] This case presents a much clearer constitutional violation than did *Joyner*. In *Joyner*, the publication in question was the official school newspaper, which reasonably might be thought to bear the imprimatur of the University. Here, *Wide Awake* is only one of many publications, and obviously does not represent the views of the institution.

[9] By the same token, courts have generally rejected the argument that funding of controversial speakers or activities out of mandatory student activities funds violates the First Amendment rights of dissenting students, so long as the fund supports a "broad spectrum of university life and reasonable representation of the various aspects of student thought and action." *Larson* v. *Regents of Univ. of Nebraska*, 204 N.W.2d 568, 571 (Neb. 1973). Accord, *e.g.*, *Kania* v. *Fordham*, 702 F.2d 475, 480 (4th Cir. 1983); *Galda* v. *Bloustein*, 686 F.2d 159, 166 (3d Cir. 1982); *Good* v. *Associated Students of Univ. of Wash.*, 542 P.2d 762 (Wash. 1975); *Lace* v. *University of Vermont*, 303 A.2d 475 (Vt. 1973); see generally Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994).

One court has permitted dissenting students to demand refunds of portions of the student activities fee that are used to support the expression of ideological viewpoints with which they disagree. *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500 (Cal.), cert. denied, 114 S. Ct. 181 (1993). Others have blocked mandatory fees for the use of a single ideological organization. *E.g.*, *Galda* v. *Rutgers*, 772 F.2d 1060 (3d Cir. 1985), cert. denied, 475 U.S. 1065 (1986). Neither issue is raised in this case. The religious nature of some of the funded speech would not affect the disposition of the refund question, for the right to a refund, if it exists, applies to secular as well as religious viewpoints with which the student disagrees. See *Smith*, 844 P.2d at 513. In any event, the *Smith* court did *not* hold that ideological groups may be excluded from the SAF program, but only that dissenting students could demand a partial refund.

Under these precedents, if petitioners produced a magazine addressing such issues as homosexuality, racism, and international events—all subjects of major articles in the first three issues of *Wide Awake*—from a gay rights (*Gohn*), racialist (*Joyner*), or antiwar (*Brooks*) point of view instead of their actual Christian perspective, the University unquestionably would be required to extend them neutral treatment. Petitioners' religious viewpoint is entitled to the same protection. We do not contend that the University must fund "religious activities" as such. But we do contend that a public university may not decline to fund a student activity that is otherwise qualified on the ground that it espouses a religious view.

The University's exclusion of "religious activities" is essentially identical to the defendant's exclusion of "religious purposes" in *Lamb's Chapel* v. *Center Moriches School Dist.*, 113 S. Ct. 2141 (1993). There, as here,

the government defendant extended a benefit (access to meeting space in a school) to a wide variety of social, civic, and recreational uses. Pursuant to a formal policy against use of the space for "religious purposes," the defendant excluded a group that wanted to show a film series addressing the subject of child rearing from a "Christian perspective." In a unanimous judgment, this Court held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 2147.

The same is true in this case. Wide Awake Productions satisfied all neutral, generally applicable criteria for funding eligibility as a "student news, information, opinion, entertainment, or academic communications media group[]" (Pet. App. 61a ¶ 4), just as the church group in *Lamb's Chapel* qualified as a "social" or "civic" organization. As in *Lamb's Chapel,* the government defendants have cited no reason for excluding *Wide Awake* other than its religious perspective. As held in *Lamb's Chapel,* that is viewpoint discrimination.

At various points in this litigation, the University has denied that its exclusion of "religious" publications constitutes viewpoint discrimination, apparently in the belief that "religion" is a separate and distinct subject matter rather than a "perspective" or "standpoint" (*Lamb's Chapel,* 113 S. Ct. at 2147) that can be brought to bear on any number of issues. This evinces a serious misunderstanding of the nature of religion.[10] Christianity (like other religions) is a comprehensive worldview that offers

[10] In any event, the University concedes in its Answer (J.A. 21-22 ¶ 16) that SAF-funded magazines are permitted to address the subject of religion—so long as they do so from a "secular" and not a "pervasively sectarian perspective." Thus, even if the Guideline against "religious activities" could be viewed as a subject-matter restriction, it is evident that the University discriminates on the basis of viewpoint within this subject category.

a way of thinking about everything from the nature of ultimate reality, to the way human beings ought to treat one another, to the character and quality of the culture. It competes in the marketplace of ideas with scores of secular philosophies, ideologies, and worldviews, as well as with other religions. To exclude a magazine which explains and advocates this worldview and applies it to issues such as racism, crisis pregnancy, eating disorders, market economics, music, education, and the fall of the Soviet Union, solely because the perspective is "religious," is plainly discrimination on the basis of viewpoint.

Moreover, the administration of the Guidelines demonstrates that the University is engaged in systematic discrimination not just between religious and nonreligious viewpoints, but among the various religious viewpoints represented at the University of Virginia. *Wide Awake* magazine is excluded because it "promotes" Christianity at the University of Virginia, but the Muslim Students Association receives SAF money to "promote a better understanding of Islam to the University Community" (J.A. 92) through its magazine, *Al-Salam. Wide Awake* magazine is excluded because it is a "religious activity," but the Jewish Law Students Association receives funds to "be a focal point for Jewish activities" and to "encourage law students to participate in Jewish activities." J.A. 97.[11]

The University stoutly insists that the Muslim and Jewish student groups are funded as "cultural—and not religious activities." J.A. 21. In a formal sense, this response is a *non sequitur.* None of these groups seeks funding as a "religious organization": the Muslim and Jewish groups are funded as "cultural organizations" and

[11] Petitioners have absolutely no objection to the funding of these other organizations; we are delighted that they are permitted to participate and believe that they enrich the life of the University community. But we believe that the funding of these organizations confirms that the Guideline against "religious activities" is inherently arbitrary.

Wide Awake would be funded as a "news, opinion, entertainment, or academic communications media group[]." The question is why the religious content of *Wide Awake* is deemed disqualifying while that of the Muslim and Jewish groups is not.

The University's answer seems to be that *Wide Awake* is more religious while the other groups are more cultural. This just illustrates the hopeless quagmire of viewpoint discrimination into which the University plunges itself by attempting to selectively silence religious voices. The line between "culture" and "religion" is highly subjective, if it exists at all. Who is to say that *Wide Awake* does not contribute to the cultural diversity of the University of Virginia campus?

It is not coincidental that in *Lamb's Chapel,* as in this case, the government's supposedly strict rule against "religious" uses admitted some seemingly religious groups (including the Salvation Army Youth Band, the Hampton Valley Council of Churches, and a New Age religious group, see 113 S. Ct. at 2146 n.5) while excluding others. It is probably inevitable that some religious groups will look more "cultural" or "civic" and others will look more "religious"—depending on the familiarity of the group and the biases of the government decisionmakers.[12] The

[12] The possibility of arbitrariness and prejudice in the University's system is illustrated by a recent interview with the chair of the Appropriations Committee of the Student Council—the body that is charged, in the first instance, with distinguishing between "cultural" and "religious" activities at the University of Virginia:

> Tanisha Sullivan, a third-year student who heads the committee that decides which student groups will get university funds, admitted in an interview that evangelical Christians are viewed warily by many students here.
>
> "It raises an eyebrow, and you look at it a little more closely just because it's Christianity," she said. "Everyone is so on edge when it comes to Christianity."
>
> The Muslim students' magazine "is teaching the culture of Islam," Sullivan said. That's a politically correct value in these days of multiculturalism. But Christianity is viewed differently, she said.
>
> "People don't consider Christianity to be part of a culture. . . . My generation is taking a turn away from Christianity and trying to explore other things, trying to break away from the norm. When you have people like the Bakers [sic] and Jerry Falwell, my generation sees Christianity as money-grubbing, sort of a farce."

James Gannon, "Christian magazine denied university funds," *Denver Post,* Nov. 8, 1994, at 5F.

Court in *Lamb's Chapel* accordingly chose not to rest its decision on the defendant's discrimination among religions (113 S. Ct. at 2147), but struck down the entire prohibition on "religious purposes." The real problem is not that the University has been sloppy or unfair in its distinctions between "religious" and "cultural" speech, but that it has no business drawing such viewpoint-laden lines in the first place.

It bears emphasis that the issues in this case fall within the very core of First Amendment protection. Petitioners' activity—the publication of a journal of opinion—is purely expressive, indistinguishable (except for editorial viewpoint) from that of newspapers and magazines anywhere. The controversy arises in a public university, which this Court has recognized as "peculiarly the 'marketplace of ideas.'" *Widmar* v. *Vincent,* 454 U.S. 263, 267 n.5 (1981); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). This Court has warned in the past that public universities should avoid regulation of student publications in ways that turn on the "*content* of the newspaper rather than the time, place, or manner of its distribution." *Papish* v. *Board of Curators of Univ. of Missouri,* 410 U.S. 667, 670 (1973) (emphasis in original). And the discrimination here is based not merely on content but on viewpoint—the most suspect of all bases of classification. *Lamb's Chapel,* 113 S. Ct. at 2147; *R.A.V.,* 112 S. Ct. at 2547.

The free speech and press holding of the Fourth Circuit is therefore unquestionably correct. Here, as in *Lamb's*

Chapel, the categorical exclusion of otherwise permissible uses on the ground that they constitute "religious purposes" or "religious activities" is "plainly invalid" under the principle that " 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " 113 S. Ct. at 2147-48 (quoting *Taxpayers for Vincent*, 466 U.S. at 804).

II. THE ESTABLISHMENT CLAUSE DOES NOT BAR RELIGIOUS SPEAKERS AND PUBLICATIONS FROM PARTICIPATING IN PUBLIC BENEFITS ON AN EQUAL AND NONDISCRIMINATORY BASIS

A. The Fourth Circuit's Interpretation Of The Establishment Clause Creates An Unnecessary And Illogical Conflict Among The Clauses Of The First Amendment

Having correctly held that the University's discrimination against "religious activities" violates the Speech and Press Clauses, the Fourth Circuit went on to conclude that this discrimination is compelled by the Establishment Clause. Pet. App. 26a-38a, 39a. "[I]t would be difficult," the court stated, "to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief." *Id.* at 35a. "Because the First Amendment forbids government to promulgate policies 'respecting an establishment of religion,' " the court continued, "government is left no choice but to foreswear financial support of the myriad forms of religious endeavor in which a student organization might engage." *Id.* at 38a.

In other words, one provision of the First Amendment requires neutrality, while the other requires exclusion. The court was forced to choose, and it chose exclusion.

Not only does the decision below create a conflict between the Establishment Clause and the Speech and Press Clauses—as the Fourth Circuit candidly acknowledged—

but it creates a conflict with the Free Exercise Clause as well.[13] "At a minimum," this Court has stated, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 113 S. Ct. 2217, 2226 (1993). See also *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, the government may not "impose special disabilities on the basis of religious views or religious status"); *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special or burdensome treatment" would violate the Free Exercise Clause); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (quoted in *Lukumi*, 113 S. Ct. at 2232) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.' "). A rule that excludes an otherwise eligible publication from access to neutral and generally available benefits, solely on account of religious beliefs, violates this principle.[14]

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[13] The Court of Appeals declined to reach the merits of petitioners' free exercise claim, stating that it had been abandoned. Pet. App. 16a n.23. This holding was erroneous. The free exercise issue was raised in the Complaint (J.A. 13-14), addressed by the district court (Pet. App. 55a-57a), and preserved by petitioners on appeal. C.A. Br. Pltffs at 18 n.3.

[14] Similar protection is provided by the Equal Protection Clause—which forbids the government to discriminate among speakers on the basis of the content of their speech. *Carey* v. *Brown*, 447 U.S. 455, 561-62 (1980). The Court of Appeals rejected petitioners' equal protection claim on the ground that petitioners did not allege discriminatory intent. Pet. App. 41a. However, since the students' claim is based on unequal treatment pursuant to an expressly discriminatory classification (not on the differential impact of a facially neutral classification), there is no requirement of a separate allegation regarding the defendants' intent. See *Washington* v. *Davis*, 426 U.S. 229, 240-41 (1976) (requiring proof of discriminatory intent only in the context of a facially nondiscriminatory governmental policy). If this Court affirms the lower court's Speech and Press Clause holdings, and reverses its Establishment Clause holding, it will not be necessary to address peti-

The decision below thus puts the Establishment Clause on a collision course with the rest of the First Amendment. It strips religious speakers of the constitutional protection accorded to secular perspectives and points of view. It condones discrimination against—not neutrality toward—religion, in violation of the Free Exercise Clause. This is a highly implausible reading of the First Amendment, taken as a whole.

It would be odd, indeed, if the various clauses of the First Amendment were so inconsistent that enforcement of one required violation of another. Surely, before reaching such a conclusion, the court below should have carefully considered alternative interpretations that would obviate this ostensible conflict. Otherwise, the court has no nonarbitrary ground for preferring one constitutional liberty over the others. While the court below simply assumed that the Establishment Clause should take precedence over the Speech and Press Clauses, it would have been equally logical (or illogical) to conclude that compliance with the Free Speech Clause negates any suggestion of a purpose or effect to establish religion.[15]

There is no support in Supreme Court precedent for the existence of such a fundamental conflict between the Speech Clause and the Establishment Clause. In at least three cases, government defendants have invoked the Establishment Clause as a justification for refusing to extend free speech rights to religious speakers, making arguments virtually identical to those made by the University in this case. See *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Board of Education* v. *Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel*, 113 S. Ct. 2141. But in each of those

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tioners' free exercise and equal protection claims separately. In petitioners' view, each of the relevant constitutional provisions requires the same outcome: the neutral treatment of religious speech.

[15] Cf. Laurence Tribe, *American Constitutional Law* § 14-8, at 1201 (2d ed. 1988) (in case of conflict, "the free exercise principle should be dominant [over] the anti-establishment principle").

cases, this Court reconciled the competing constitutional claims without subordinating the free speech claim, concluding that a policy of neutrality created no serious danger of an Establishment Clause violation. *Widmar*, 454 U.S. at 270-75; *Mergens*, 496 U.S. at 247-53; *Lamb's Chapel*, 113 S. Ct. at 2148. We believe those cases establish a general principle, which compels reversal of the judgment below.

As shown by these cases, the proper analysis does not give precedence to one constitutional right over another, but delineates the appropriate scope of each. The "crucial difference," this Court has explained, is "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (emphasis in original); see *Widmar*, 454 U.S. at 271 n.9. The Establishment Clause limits the power of the government, not the freedom of citizens. As Professor Douglas Laycock has expressed the point: "The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers." Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U. L. Rev. 1, 3 (1986).

This distinction tracks the line between speech by government agents and officials, which is subject to substantial government control, and speech by private persons, where government control is far more circumscribed. See *Waters* v. *Churchill*, 114 S. Ct. 1878, 1886-88 (1994). Where the government exercises control over the content of speech, it follows that the messages conveyed are properly attributable to the government and thus subject to Establishment Clause strictures on government speech. But by the same token, where the government exercises no control over speech content, then the speech is attributable

to the private speaker and the Establishment Clause is not implicated.

This Court has held repeatedly that the mere receipt of government funds does not convert a private decision into state action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-41 (1982); *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Polk County* v. *Dodson*, 454 U.S. 312 (1981). Rather, the inquiry focuses on the government's involvement in the decision itself—here, the editors' decision about the content of the magazine—to determine whether that decision has been made or significantly influenced by the government. As the Court explained in *Rendell-Baker*, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 840 (quoting *Blum*, 457 U.S. at 1004).[16]

Not surprisingly, these "state action" precedents point to almost exactly the same considerations that the Court has invoked to distinguish between religious expression in school settings that is attributable to the state and thus an establishment of religion, and religious expression that is privately initiated and thus permitted on a neutral basis. In *Lee* v. *Weisman*, 112 S. Ct. 2649 (1992), for example, the Court stressed the fact that "[a] school official, the principal, decided that an invocation and a benediction should be given" and noted that "this is a choice attributable to the State." *Id.* at 2655; see also *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam) (striking down state law requiring posting of the Ten Commandments). By contrast, the prayers and other religious speech in *Widmar* and *Mergens* were student-initiated and, the Court stressed, neither encouraged nor endorsed by the state. See

[16] *Rendell-Baker* is particularly pertinent, because it involved the claim that the actions of a private party violated the First Amendment on account of the fact that the party's activity was state funded. Essentially the same question is presented here.

Mergens, 496 U.S. at 250-51 (distinguishing between "State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other") (citation omitted); *Widmar*, 454 U.S. at 271 n.9 (noting that the Establishment Clause applies to "speech, undertaken or approved by the State").

In this case, no one could suggest that the University is responsible in any way for petitioners' decisions about the content of their magazine. See *Kania* v. *Fordham*, 702 F.2d 475, 476 (4th Cir. 1983) (public university "exercises no control whatsoever" over the content of a student publication even though it is funded by the mandatory student activities fee). The University's stated policy with respect to all recognized student groups ("CIO"s) is set forth in the standard "Agreement for a Contracted Independent Organization," as follows:

> The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. The CIO is not an agent, servant or employee of the University, but rather is an independent contractor which manages its own affairs.
>
> The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities, except to the extent, if any, the University chooses to exercise control over activities occurring on its property, or over matters covered by the University's honor or judiciary systems.

J.A. 27. By providing assistance to a broad range of student publications and activities, without preference based on ideology, the University neither encourages any particular viewpoint nor becomes identified with it. Indeed, the University expressly disavows any approval of *Wide Awake*'s goals or activities, as it does those of all other CIOs at the University. J.A. 26, 28. As in *Rendell-Baker*, the decisions of the private individuals involved

are "not compelled or even influenced by any state regulation." 457 U.S. at 841.

Of course, in some contexts the activities of recipients of government funding *are* "fairly attributable to the State." *Rendell-Baker*, 457 U.S. at 838 (quoting *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). Thus, to cite an easy case, the decision of a public school teacher to lead his class in prayer is state action, and is barred by the Establishment Clause. And when the government enlists private organizations as grantees to convey the government's own messages to the public about matters such as family planning or adolescent sexual self-discipline, the grantees' speech is properly attributable to the government. See *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988). Because of their status as conduits for government messages, grantees under such programs are subject to reasonable government restrictions on their own speech (*Rust*), and the government is under an obligation to ensure that the grantees do not teach or promote religion (*Kendrick*). That does not mean, however, that recipients of general subsidies for speech activities, where the government is supporting a diversity of expression and not attempting to communicate its own message, are stripped of free speech rights or subject to Establishment Clause limits. *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221 (1987); *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970).

In this era of pervasive government, the notion that any speech that occurs on public property or that benefits from government action is thereby "attributable to the State" is frightening in its implications. As government action increases in scope, the place for religious speech would shrink and shrink. The growing government would become a relentless engine of secularization. As government becomes involved in more and more formerly private areas of life (child care, voluntary charitable work, elder care, health choices, the arts) it is increasingly apparent that the only principle consistent with preservation

of religious pluralism is one of neutrality and accommodation. As this Court noted in *Lee* v. *Weisman*, 112 S. Ct. at 2661, a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."

Thus, contrary to the Fourth Circuit, the principles of free speech and nonestablishment are entirely compatible. There is no need to decide which constitutional liberty should be given preference. The task of courts in both contexts is to determine where private rights end and government control begins. Where the speech of private persons is involved, the government must remain scrupulously neutral among competing viewpoints, both secular and religious. Where government-controlled speech is involved, the government must avoid sponsorship, favoritism, or direct association with religion.

When the Fourth Circuit concluded that the Student Activities Fund is within the realm of freedom of speech, where the government is forbidden to discriminate on the basis of the content and viewpoint of the speech, that conclusion did not create a conflict with the Establishment Clause: it answered the Establishment Clause question. If the speech at issue is that of a private speaker exercising free speech rights, then it is not "government speech" and is outside the purview of the Establishment Clause.

B. The Fourth Circuit's Interpretation Of The Establishment Clause Conflicts With This Court's Precedents

Even viewed on its own terms, independently of the Speech, Press, and Free Exercise Clauses, the Establishment Clause is not offended by participation of a religiously oriented student group in a student activities fund. This Court has held in case after case in the last decade that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities.

As Justice Brennan stated in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989), "[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." In *Witters* v. *Department of Services*, 474 U.S. 481 (1986), the Court held that aid does not violate the Establishment Clause if it is " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed toward religion." *Id.* at 487-88 (quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). See also *Board of Education of Kiryas Joel* v. *Grumet*, 114 S. Ct. 2481, 2491 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Lee* v. *Weisman*, 112 S. Ct. at 2678 n.8 (Souter, J., concurring) (the Establishment Clause is not violated when "the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. 226; *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Widmar*, 454 U.S. 263. See generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

Although the most emphatic opinions stressing the overriding importance of neutrality have been relatively recent, the principle is not new. It was clearly enunciated by the

second Justice Harlan in his concurring opinion in *Walz* v. *Tax Commission*, 397 U.S. 664, 697 (1970):

> As long as the breadth of [the benefit] includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, theistic, or agnostic, I can see no lack of neutrality in extending the benefit * * * to organized religious groups.

Indeed, in the first of this Court's modern Establishment Clause cases, Justice Black warned that "we must be careful, in protecting the citizens * * * against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

The Fourth Circuit's opinion cannot be reconciled with these precedents. SAF funds are distributed to some 118 different student groups, including 15 newspapers and magazines, representing a broad and diverse array of opinions and interests. Cf. *Widmar* v. *Vincent*, 454 U.S. at 274. The criteria for eligibility are "in no way skewed towards religion" (*Witters*, 474 U.S. at 488). Once the restriction on "religious activities" is removed, the program will be perfectly neutral. Under *Texas Monthly*, *Zobrest*, *Witters*, *Widmar*, and *Mueller*, that is the end of the matter. The time has come for this Court to make clear: the Establishment Clause does not require, and must not be used to justify, discrimination against any person or group on the basis of the religious character of their speech, ideas, or motivation. See *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. * * * The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.").

Exclusion of *Wide Awake* from the student activities fund serves no genuine purpose or value of the Establish-

ment Clause. On the contrary, each of the traditional concerns of the Establishment Clause is better advanced by reversing the University's viewpoint-discriminatory policy. Thus, we next address the traditional concerns underlying the Establishment Clause—not as separate Establishment Clause "tests" but rather as reasons supporting the holding of the cases above: that the distribution of benefits to a broad array of recipients, without regard to religion, does not offend the Establishment Clause.

Secular purpose and effect. The first two prongs of the *Lemon* test require that government action have a purpose and primary effect that is secular and does not advance religion. 403 U.S. at 612-13.[17] If the decision below is reversed and the University is required to administer the student activities fund without discrimination against religious points of view, these requirements will be satisfied. The purpose and effect of the CIO program at the University of Virginia is to "enhance the University environment" by supporting "a wide range of opportunities for its students." J.A. 26. This is essentially the same as that of the open forum policy in *Widmar*, 454 U.S. at 271 & n.10. By funding some 118 student organizations of different and conflicting viewpoints, the University advances not "religion" but the ability of students to speak their own minds and to hear a diverse range of views.

In our opinion, the Fourth Circuit's error stems from an ambiguity in the expression: "primary effect that * * * advances * * * religion." *Lemon*, 403 U.S. at 612. The court seemed to think that religion is "advanced" within the meaning of the *Lemon* test whenever a group "clearly engaged in the propagation of particular religious

[17] We recognize that a majority of the Justices of this Court have expressed doubts about the continued utility of the *Lemon* test and have therefore not confined our analysis of the Establishment Clause issue to that framework. See *Kiryas Joel*, 114 S. Ct. at 2498-99 (O'Connor, J., concurring).

doctrines" (Pet. App. 35a) is a beneficiary of government action. But as the "neutral benefits" cases demonstrate, that is not the constitutional principle. If it were, religious groups would have to be quarantined from all public benefits, no matter what their form. Rather, the analysis ought to focus on whether religious individuals or groups have been given *preferential treatment*. If religious activities simply share in the benefits of government action on a neutral basis, along with other activities, the Establishment Clause is not offended. In view of the widespread confusion among governmental bodies and lower courts on this point (see cases cited in the Petition, at 18-19 nn. 10 & 11), petitioners believe that the "effects" prong of *Lemon* should be replaced with a simple statement that the government may not accord religious institutions, speech, or activities preferential treatment, unless special treatment can be justified as a means of accommodating the free exercise of religion.[18]

Coercion or inducement of religion. One of the core purposes of the Establishment Clause is to protect religious liberty by ensuring that government power is not used to coerce or induce religious practice or belief. See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in part); *Lee* v. *Weisman*, 112 S. Ct. 2649 (1992). The allocation of resources is an important element of governmental power, and must not be employed in such a way as to favor religious, nonreligious, or antireligious viewpoints over the alternatives. *Everson*, 330 U.S. at 15; *Lee* v. *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring). The ideal is for government action to have as little impact on relig-

[18] Because this case does not involve the special treatment of religion, there is no need to examine the constitutional standards for permissible accommodation of religion. Recent discussions of those standards appear in *Texas Monthly; Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987); *Kiryas Joel*, 114 S. Ct. at 2501-03 (Kennedy, J., concurring); *id.* at 2512-13 (Scalia, J., dissenting); *Lee* v. *Weisman*, 112 S. Ct. at 2676-78 (Souter, J., concurring).

ious life as is possible. See Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. Chi. L. Rev. 805 (1978).

The only way to ensure that government funding does not distort the marketplace of ideas is to distribute the funds neutrally, without discrimination based on viewpoint. Then all student groups, whatever their philosophical orientation, will be free to act in accordance with their own conscience and convictions. They will not be tempted to trim their sails or compromise their position to win access to funding. As this Court recognized in *Witters*, a program that provides no "greater or broader benefits" to religious than to nonreligious activities "creates no financial incentive for students" to alter their preferences, whether in a religious or a nonreligious direction. 474 U.S. at 488. All students pay into the student activities fund at an equal rate, and it is only fair that they should be equally eligible to share in its benefits, without favoritism or discrimination based on religion.

On the other hand, as the Fourth Circuit recognized in the Speech and Press Clauses portion of its opinion, the discriminatory exclusion of "religious activities" *does* have the effect of skewing the marketplace of ideas at the University of Virginia: the Guideline "creates an uneven playing field on which the advantage is tilted towards * * * wholly secular modes of expression." Pet. App. 26a. The University Guideline obviously creates an incentive for religious students, if they hope to get funding for a publishing venture to hide or suppress their actual opinions. A clearer example of a "chilling effect" on free speech is difficult to imagine.

Endorsement. The purpose of the endorsement principle is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred.*" *Wallace* v. *Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)

(emphasis added). Contrary to the decision below (Pet. App. 37a-38a), the neutral provision of benefits to a broad array of student groups and activities negates any possible appearance of endorsement. *Widmar*, 454 U.S. at 274; *Mergens*, 496 U.S. at 252; see also *Lamb's Chapel*, 113 S. Ct. at 2148; *Witters*, 474 U.S. at 488-89. Benefits programs that are objectively neutral toward religion could not "reasonably" be perceived as an endorsement.

No informed observer of the University of Virgina student activities program could infer that the University "endorses" all of the many conflicting views that are represented there. As the University itself insists in its CIO agreement with student groups, the "benefits" received by a group "should not be *misinterpreted* as meaning that * * * the University approves of the organization's goals or activities." J.A. 26 (emphasis added). The University requires that each such group include in all of its written materials (which would include each issue of *Wide Awake*) a disclaimer of University responsibility for the acts and omissions of the group. *Id.* at 28. If the University desires (or the Constitution requires) a more comprehensive disclaimer, petitioners would be happy to oblige them.

Indeed, it is the *exclusion* of a group, based on its religious viewpoint, that realistically presents a constitutional problem. Official disapproval of religion is no less a constitutional issue than endorsement, for both send a message that some citizens, based on their religious viewpoint, "are outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Religious students at the University of Virginia cannot help but wonder why their point of view, alone among the various ideologies, philosophies, and worldviews of the student body, suffers this state-imposed disability. See *County of Allegheny*, 492 U.S. at 663-65 (Kennedy, J., concurring in part)

("enforced recognition of only the secular * * * would signal not neutrality but a pervasive intent to insulate government from all things religious"); see also *Mergens*, 496 U.S. at 248. Policies like the University Guideline contribute mightily to the impression that religious perspectives are somehow inappropriate, irrelevant, or disfavored in American public life. See generally Stephen Carter, *The Culture of Disbelief* (1993); Richard J. Neuhaus, *The Naked Public Square* (1984).

Historical argument against funding of religion. One of the central events leading up to adoption of the Religion Clauses of the First Amendment was the so-called "Assessment Controversy" in Virginia in 1784-85. Alarmed by the decline of religion and public virtue in the state in the aftermath of the Revolution, legislators proposed a tax "for the support of Christian teachers." This proposal inspired James Madison to write his famous argument, *Memorial and Remonstrance Against Religious Assessments*, which (along with other arguments) provoked great public opposition to the proposal and eventually led to its defeat.[19]

The lesson sometimes extracted from this episode is that tax money may not be used for religious purposes. See *Everson*, 330 U.S. at 16 ("[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"); *Walz*, 397 U.S. at 700-27 (Douglas, J., dissenting). But that reflects a misunderstanding of the context of the debate and the arguments Madison

[19] Both the Bill and Madison's *Remonstrance* were reprinted as an appendix to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63-74, and we will cite to that source. For additional historical background, see Thomas J. Curry, *The First Freedom: Church and State in America to the Passage of the First Amendment* 134-48 (1986); A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty* 8-20 (1990). For an analysis specifically directed to questions of neutrality in funding, see Michael Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 326-27, 334-35 & n.110 (1986).

marshalled against the tax. The point that is overlooked is that the Virginia proposal was a tax imposed for the *sole* purpose of fostering religion. The reason this was objectionable is not that it provided "aid" to "religion" but that the aid it provided was *not* neutral, in either purpose or effect. In Madison's words, the proposal "violates that *equality* which ought to be the basis of every law." *Memorial and Remonstrance* ¶ 4, quoted in 330 U.S. at 66 (emphasis added).

The lesson of the Assessment controversy cannot be stretched to cover a general public benefits program, conducted for a secular purpose, under which citizens receive funding for a variety of activities on a neutral basis unrelated to their religious message, and certainly does not imply that religious groups should suffer any special disability or discrimination. Indeed, any favoritism—for or against religion—"degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.* ¶ 9, quoted in 330 U.S. at 69.

While one might challenge the legitimacy of the entire mandatory Student Activities Fund on the ground that it requires students to furnish contributions for the propagation of opinions they disbelieve (it requires liberals to subsidize the Federalist Society, traditionalists to support feminist groups, and meat eaters to support animal rights), courts have uniformly upheld such programs on the ground that they have a legitimate educational purpose and are used to support a wide diversity of views. See, *e.g.*, *Kania* v. *Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (while mandatory student fees are impermissible if they "enhance[] the power of one, and only one, ideological group," they are legitimate when they "increase[] the overall exchange of information, ideas, and opinions on the campus"); Note, 103 Yale L.J., *supra*, at 2019 ("[w]hen a general fund is made available so that students of differing viewpoints can express themselves to their fellow students, fee-paying students are not

being compelled to fund the dissemination of one viewpoint with which they disagree"); accord cases cited in note 9, *supra*.

This explanation does not lose its persuasiveness when religious views are among the mix. The SAF program no more violates the principle against compelled support for speech than does the University of Virginia library (which uses tuition and tax proceeds to purchase books of every shade of opinion, including religious books), the United States Postal Service (which extends postal subsidies to a broad range of non-profit organizations, including religious ones), or the National Endowment for the Arts (which presumably supports religious art, as well as art that many people consider antireligious or profane).

Entanglement. Finally, for agencies of the government to extend benefits neutrally to all, without regard to religion, eliminates any need for the "entanglement" that can arise when government scrutinizes student conduct and attempts to determine which activities are "religious." The Guideline against funding religious activities *creates* entanglement; it does not diminish it. As the Court noted in *Widmar*, "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" 454 U.S. at 272 n.11; accord *Mergens*, 496 U.S. at 253.

Under the present Guidelines, University officials are forced to examine each issue of *Wide Awake* and to monitor activities of each student group to make sure they are not too "religious." This is far from a mechanical determination. In the University's estimation, some seemingly religious groups are more "cultural" than "religious." See pages 5-6, 19-21, *supra*. We wonder how such judgments are made. We know University officials read copies of *Wide Awake*. Does the University send a monitor to the Jewish group's gatherings to make sure that they do not speak of the Torah? Or to the Muslim group's public lecture on "Western Misconceptions About

Islam" to make sure that the "misconceptions" are not theological in nature? Does it check the C.S. Lewis Society's reading list to make sure it is not top-heavy with apologetic or exegetical works? Such meddlesome scrutiny threatens the Establishment Clause ideal of governmental impartiality and noninterference.

We submit, therefore, that the neutrality principle of this Court's recent cases fully achieves the purposes of the Establishment Clause and requires reversal of the decision below.

C. Contrary Precedent Should Be Distinguished Or Overruled

In all candor, this Court's precedents regarding the participation of religious individuals or groups in neutral government benefits have not been consistent. Although the Court's early "aid" cases—*Bradfield*, *Everson*, *Allen*, and *Walz*—were resolved in favor of the neutral extension of benefits, this Court's decision in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), inaugurated a period in which the constitutionality of aid was seen to depend not on the neutrality of the government's own allocation of benefits, but on the character of the recipient and the use to which the benefits were put. Thus, whenever government aid went to a "pervasively sectarian" institution or was used for a "specifically religious activity," it was deemed to be a violation of the Establishment Clause. *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 752 (1976). It was this line of cases—specifically *Hunt*—on which the decision below rested. See Pet. App. 35a (quoting *Hunt*, 413 U.S. at 743).

Rightly or wrongly, this Court viewed the *Lemon-Hunt* line of cases, which involved aid to parochial schools, as entirely distinct from the "neutral benefits" cases discussed in the previous section. The Court did not view benefits to religious schools and colleges as the incidental consequence of a neutral program of aid to all private schools,

or as part of a neutral program of financing all forms of education. If the Court had viewed the cases in that way, they would have been utterly inconsistent with the whole line of neutrality cases before and since. Instead, the Court viewed the cases as involving non-neutral aid to beneficiaries that were overwhelmingly religious in character and, indeed, overwhelmingly of one religious denomination. In *Lemon*, for example, 96% of the students who attended the recipient institutions were pupils at religious schools and "most" of those schools were Roman Catholic. 403 U.S. at 610. In the companion case, *Early* v. *DiCenso*, the "sole beneficiaries" of the Rhode Island Salary Supplement Act were Roman Catholic schools. *Id.* at 615. In *Nyquist*, "all or practically all" of the schools eligible for maintenance or repair grants were Roman Catholic, and 85% of those eligible for other forms of aid were church affiliated. 413 U.S. at 768. See also *Grand Rapids School Dist.* v. *Ball*, 473 U.S. 373, 379 (1985) ("[f]orty of the forty-one schools at which the programs operate are sectarian").

The parochial school cases thus present a question different from that presented in this case. Here, as in *Witters*, *Mergens* and *Widmar*, the aid flows to a wide range of activities, of which religious activities will constitute only a small fraction. In the parochial school context, the Court must determine whether government assistance programs that are defined in neutral terms but that in practice benefit only a narrow class of religious schools are "neutral" in the constitutionally significant sense.[20] This is the issue that divided the principal opinion from the five concurring Justices in *Witters*, and the majority from the dissent in *Mueller*. Those considerations do not affect the decision in the present case, where the formal

[20] The Court will also have to decide whether the denominator in any calculus of neutrality will include all schools (including secular public schools) or only private schools, which are predominantly religious. Compare *Nyquist*, 413 U.S. at 782 n.38, with *id.* at 801-03 (Burger, C.J., dissenting in part).

criteria are neutral *and* the resulting array of beneficiaries is broad and diverse.

The parochial school cases are therefore readily distinguishable, and indeed, to make sense of this Court's precedents we must assume that the Court has always viewed them as distinct. It is possible, therefore, for the Court to resolve this case without revisiting the merits of the *Lemon-Hunt* cases on which the Fourth Circuit relied. But if the Court does not distinguish the cases, there are four reasons why the Court should expressly overrule the principle announced in these cases: that government benefits may not be given even on a neutral basis to "pervasively sectarian" institutions or "specifically religious" activities.

First, the focus on specific uses of government funds is inconsistent with the premise that the Establishment Clause limits government action, not private religious activity. See *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987) ("[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"); *Witters*, 474 U.S. at 488 ("it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion"). So long as the government itself remains neutral, pursuing secular objectives and neither favoring nor disfavoring religion, it should not matter that individual citizens take advantage of the benefits of civil society to advance their religious ideas. Government provides police and fire protection to churches along with other buildings; the fact that religious preaching and worship benefit from the aid does not raise a constitutional problem.

Second, these cases make the mistake of focusing on the specific application at hand, rather than the effect of the program as a whole. The Fourth Circuit disregarded the effect of the SAF program in general (which is to

foster a diverse set of activities and ideas at the University of Virgina), and instead based its decision on the effect, in isolation, of funding *Wide Awake*. See Pet. App. 37a ("providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake*'s Christian mission"); *id.* (referring to "a continuing annual appropriation for the benefit of a single religion").

As Justice Powell pointed out in *Witters*, this analysis "conflicts with both common sense and established precedent." 474 U.S. at 492 (concurring opinion). "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). Rather than examine whether a general program has "the practical effect of aiding religion *in this particular case*," the court must "look[] to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (Powell, J., concurring). If the program as a whole is neutral toward religion, it does not matter that a particular use is for a "specifically religious activity."

Third, the prohibition on "specifically religious uses" led to a confusing and unpredictable series of closely divided decisions in which various forms of aid were evaluated for their potential to advance the ideological mission of recipient schools. It appears that there was no workable, predictable, and nonarbitrary way to draw this line. See *Wallace* v. *Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (summarizing cases). Textbooks are permissible, but filmstrips and tape recorders are not. Bus rides to religious schools are permissible, but bus rides from religious schools to the local police station, city hall, or museum are not. Religiously affiliated grantees can use government funds to teach sexual morality, but public school teachers may not teach remedial math on the premises of a religiously affiliated school. Various diagnostic services are permissible; heating and

repair work is forbidden. If ever a jurisprudence has proven "unworkable," this is it. See *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2809 (1992) (joint opinion); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

Fourth, it is this interpretation of the Establishment Clause that creates the conflicts with freedoms of speech, press, and free exercise of religion, discussed at pages 22-24 *supra*. If religious activities fall within the terms of a neutral benefits program (as *Wide Awake* falls within the terms of the subsidy for "student news, information, opinion, entertainment, or academic communications media groups"), enforcement of a prohibition against "specifically religious uses" requires *discrimination against* religion. That is not a valid constitutional principle. See page 31, *supra*. The "specifically religious activities" cases should either be repudiated or confined to their facts: to aid programs that are not neutral and generally available.

D. The Fourth Circuit's Distinction Between Cash Subsidies And Other Forms Of Aid Is Inconsistent With This Court's Precedents And Bears No Relation To The Purposes Of The Establishment Clause

The Fourth Circuit recognized that modern precedents of this Court are based on neutrality toward religion (Pet. App. 36a-37a), but attempted to draw a line between cash subsidies and other forms of aid. Thus, while the government is compelled (or at least permitted) to be neutral toward religion with regard to free use of government facilities, tax benefits, and police, fire, sewerage, and other services, it must exclude religious activities from the benefits of cash subsidy programs:

> Direct monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color. A proper respect for the Establishment Clause compels the Rector and Visitors to pursue a course of "neutrality" toward relig-

> ion. Yet providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake*'s Christian mission.

Pet. App. 37a. See also *id.* at 31a n.31 ("[b]ecause this case involves a direct governmental subsidy of religious expression rather than a mere exemption from the payment of duties, it is not directly on point with *Texas Monthly*").

The distinction between cash and other benefits, however, is supported neither by this Court's precedents nor by logic. In *Witters*, this Court unanimously held that it would not violate the Establishment Clause for the state to make a direct cash grant to pay a student's tuition to study religion at a pervasively sectarian institution, the Inland Empire School of the Bible. The fact that cash was involved was not even mentioned as a significant factor. See also *Nyquist*, 413 U.S. at 782 n.38 (approving provisions of the "G.I. Bill," which provides cash grants for study at religious institutions, among others).

Indeed, this Court expressly rejected just such a distinction in *Committee for Public Education* v. *Regan*, 444 U.S. 646 (1980). There it was argued that the state could provide test grading services to religious schools but could not pay cash for the purchase of the same services. "We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or to the realities of school finance," the Court explained. "None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash." *Id.* at 658.

The opinion below is bereft of any plausible explanation of the purposes to be served by a distinction between cash and other valuable benefits. Certainly, we would not say that a secular group—for example, the gay rights group in *Gay & Lesbian Students Ass'n* v. *Gohn*—had been treated "neutrally" if it were given access to University facilities but cut off from the Student Activities Fund

on account of the content of its speech. The claim that payment of *Wide Awake*'s publication costs would "advance" its "Christian mission" (Pet. App. 37a) does not distinguish cases involving other forms of aid. This Court's decisions in *Lamb's Chapel, Witters, Mergens, Widmar, Mueller, Walz, Allen,* and *Everson* were not based on the proposition that the religious groups involved did not benefit from the aid, but on the proposition that the aid was neutrally distributed, without reference to religion.

There is no persuasive reason to believe that neutrality has one meaning in the context of cash, and the opposite meaning in the context of other public benefits. Tax benefits, free facilities, and government services may well be more valuable to the group (and more costly to the taxpayer) than a modest cash subsidy. Perhaps the Court of Appeals was thinking only of certain facilities, such as empty classrooms or grounds, which can be made available at little or no marginal cost. But this is exceptional, rather than routine. In *Witters, Mueller, Walz, Allen,* and *Everson*, the marginal cost was substantial, and as readily identifiable as a cash grant.

Nor do cash subsidies necessarily impart any greater "endorsement" than any other form of aid. For a public school to be used for prayer and religious study, as in *Mergens* or *Lamb's Chapel*, might—to the uninformed onlooker—impart a serious, if mistaken, impression of government endorsement. It is far more improbable that a University of Virginia student, who is aware that the University funds a variety of different and conflicting perspectives, would draw such an inference from the mere fact of SAF funding. This point was made with considerable force by the dissenters in *Zobrest*, who explained why they believed that the cash subsidies in *Witters* and tax benefits in *Mueller* were less objectionable than the provision of a sign language interpreter:

> Those cases [*Witters* and *Mueller*] dealt with the payment of cash or a tax deduction, where govern-

> mental involvement ended with the disbursement of funds or lessening of tax. * * * When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion.

Zobrest, 113 S. Ct. at 2474 (Blackmun, J., joined by Souter, J., dissenting).

Moreover, cash subsidies do not necessarily lead to greater government monitoring or entanglement—especially where, as here, payments are made directly to the printer or other suppliers and not to the group. There is no evidence that the funding of other student groups has led to involvement or intrusion in their affairs.

Indeed, the distinction between cash and other valuable benefits is so thin that it would lead to absurd results. The University concedes that, under *Widmar*, the students are entitled to use University facilities, including "University computer terminals, printers, and other equipment employed in the preparation of manuscripts for publication" (Pet. App. 8a), on an equal basis. If the University maintained the equipment for desktop publishing, the students presumably would be able to print *Wide Awake* on those facilities. It makes absolutely no sense to say that petitioners have a free speech right to use University resources to print *Wide Awake* if the University owns the necessary equipment, but that the Establishment Clause cuts the other way if the job must be done by an outside printer. Money and services are fungible; to draw the line between money and services is a classic example of elevating form over substance.

* * * * *

The basic principle at stake in this case is the equality of rights for all who wish to exercise the freedom of speech, without discrimination on the basis of religious or ideological viewpoint. Under the decision below, religious speakers are denied constitutional protections accorded their fellow citizens, and instrumentalities of government are compelled to engage in continuous censorship of religious expression. Nothing could be further from our constitutional ideal of freedom of speech, press, and religion. The American Republic was no more intended to elevate secular speech and ideas over religious speech and ideas than it was to do the opposite. The Establishment Clause was designed to guarantee neutrality and religious pluralism, not to relegate religious speech to second class status. In the words of retired Justice William J. Brennan, Jr.: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause * * * may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (concurring opinion).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded with instructions to the courts below to grant petitioners' motion for summary judgment.

Respectfully submitted,

MICHAEL W. MCCONNELL *
ALAN E. UNTEREINER
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400, ext. 102

Counsel for Petitioners

* Counsel of Record

RESPONDENT'S

BRIEF

[redacted]

[redacted]

[redacted]

QUESTION PRESENTED

Whether a state university is constitutionally required to subsidize with public funds the preparation and distribution of a religious student group's publication designed to advocate a particular religious belief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-329

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Petitioners' statement of the case is crucially incomplete. By presenting only a partial history of this litigation, they attempt to raise an issue not properly before this Court.

Specifically, petitioners make two kinds of claims. First, they argue that the University of Virginia Student Activity Fee Funding Guidelines are facially unconstitutional because they exclude religious (and certain other) activities

from funding. This claim was litigated below and is properly before this Court.

Second, petitioners argue that the Guidelines are unconstitutional as applied. They concede, as they must, that publication of *Wide Awake* was a religious activity. They must also concede that on their face the University Guidelines exclude from funding *all* religious activities; facially the Guidelines neither support nor tolerate distinctions among religions. Nonetheless, petitioners assert that "the administration of the Guidelines demonstrates that the University is engaged in systematic discrimination ... among the various religious viewpoints represented at the University of Virginia." Pet. Brief at 19. In other words, petitioners claim that the facially neutral Guidelines have been discriminatorily applied. This as-applied claim is not properly before this Court. To see why this is so requires a brief look at the procedural history of this litigation.

A. Procedural History

Petitioners' original complaint raised both kinds of issues, but the litigation soon took a different turn. On November 12, 1991, *before discovery*, petitioners moved for summary judgment. The University filed a cross-motion for summary judgment, and the case was submitted on a mutually developed record. That record included three issues of *Wide Awake*, the Guidelines, an affidavit from the Associate Dean of Students (who oversees the funding process), the constitutions of various student organizations that received funds, and affidavits from their leaders. It most certainly did not include proof of discrimination by the University.

Nevertheless, petitioners argued in the district court that the money given to the Muslim Law Students Association and the Jewish Law Students Association, which the University

funded as cultural rather than religious activities, showed anti-Christian bias. Specifically, petitioners claimed that "[t]he only apparent explanation for the refusal to fund Wide Awake is discomfort with or disapproval of the Christian perspective expressed in its magazine." Pls.' Mem. P. & A. in Supp. of Mot. for Summ. J. at 32. Petitioners mentioned this contention under their Free Speech claim, *id.*, but developed it at length under their Equal Protection claim. See *id.* at 42-47. Accordingly, it was under the latter heading that the district court considered the allegation of discriminatory administration. See *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 795 F. Supp. 175, 183 (W.D. Va. 1992); Pet. App. 57a ("The last issue for the court to resolve is the plaintiffs' claims that the Guidelines have been applied in less than an even-handed manner.").

After a careful review of all the evidence before it, the district court flatly rejected petitioners' claim of discriminatory administration. The opinion states: "The court has reviewed the entire record independently, and cannot find any evidence to indicate that the decision to deny funding to WAP [Wide Awake Productions] was based on discriminatory intent." *Id.* at 183; Pet. App. 58a. On this and other grounds (chiefly the finding that the allocation of moneys collected from student activity fees was not a public forum), the district court entered summary judgment for the University.

At this point, petitioners effectively abandoned the as-applied claim. The district court's opinion and judgment had made crystal clear that it had found no factual evidence of discriminatory administration. If petitioners had wished (or been able) to produce such evidence, they could have asked for a trial. This they did not do. They did not appeal on the ground that the district court had overlooked a genuine issue of material fact. They did not announce a desire to engage

in discovery. They did not ask the Fourth Circuit to remand for a trial, where their claim of discriminatory enforcement could be put to the proof. In short, petitioners did not avail themselves of the opportunity to prove what they had alleged. On the contrary, they informed the Fourth Circuit that "[t]here are no disputed issues of material fact and the case is ripe for resolution by this Court," Br. of Pls.-Appellants at 3, and devoted their argument entirely to the legal issues.

It is true that in the Fourth Circuit, petitioners again alleged that "the University discriminates against appellants on the ground of their Christian point of view." *Id.* at 27. But petitioners undermined that allegation by not asking that the case be remanded for trial. More importantly, in the Fourth Circuit, petitioners dropped their equal protection claim (which was where discriminatory enforcement had been alleged below) and failed to contest the district court's finding that there was no evidence to support that claim. In the words of the Fourth Circuit, the district court's finding -- that there was "no evidence to indicate that the University's denial of SAF funding to Wide Awake Productions was the product of discriminatory intent" -- "is not contested by the plaintiffs on appeal." *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 18 F.3d 269, 288 (4th Cir. 1994); Pet. App. 41a. The Fourth Circuit also noted petitioners' "failure to argue the existence of discriminatory intent as a matter of law on appeal ... ." *Id.*

In short, in the district court and even more clearly in the Fourth Circuit, petitioners concentrated on a facial attack on the University's funding Guidelines. Given the procedural history of the litigation, no other claim was fairly presented. That was certainly the understanding of the Fourth Circuit, which in the course of a long and detailed opinion said *not one word* about petitioners' allegation of systematic discrimination among religious viewpoints (other than to note that the district court's factual findings were not contested on appeal).

The omission cannot be dismissed as oversight, for petitioners' allegation, if credited, would have been dispositive. No legal theory could have justified systematic discrimination among religions. No court would have ruled in favor of the University on those facts. Yet both the district court and the court of appeals did rule in favor of the University. Both courts concluded that the allegation of discriminatory administration was unsupported and that the only question presented by the record was whether the categorical exclusion of all religious activities from University funding violates the First Amendment. This is the only question before the Court.

B. Record Evidence

Petitioners' allegation of systematic discrimination among religions is not only foreclosed; it is also unfounded. Petitioners make much of the fact that the University funded activities of certain cultural organizations with links to specific religious traditions. These include the Muslim Students Association and the Jewish Law Students Association, both of which are linked to religious traditions that happen to be non-Christian. They also include the C.S. Lewis Society, which promotes discussion of literary, moral, and philosophical topics, including the works of the Oxford Christians. In 1990-91, the University also funded Black Voices, a gospel singing group. Not surprisingly, petitioners do not mention these groups when they accuse the University of anti-Christian bias. See Pet. Brief at 19.

Most of these organizations -- the Muslim Students, the Jewish Law Students, and Black Voices -- were funded as

cultural organizations.[1] Under the funding Guidelines, a "cultural organization" is one "which is *primarily* concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art, and/or tastes." Pet. App. 65a (emphasis added). The record contains no evidence that these groups were improperly classified as eligible organizations. Nor have petitioners claimed that they were.

Of more importance here, the University funded these cultural organizations for non-religious activities. Under the funding Guidelines, a "religious activity" is one "which *primarily* promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." Pet. App. 66a (emphasis added). Key elements of such activities are religious observances and proselytizing. The record supports the finding that the activities for which these groups sought funding did not involve religious observances and proselytizing and were therefore not "religious activities" within the meaning of the Guidelines.[2]

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[1]The C.S. Lewis Society was funded as a co-curricular organization. J.A. 103.

[2]In 1990-91, the Muslim Students Association received no funding. In the preceding year, they had received $164. An affidavit from their president states that their meetings are "essentially informal gatherings of students sharing a common cultural background." J.A. 90. The meetings involve no religious observance or prayer, and there is no evidence of proselytizing or other primarily religious activity.

In 1990-91, the Jewish Law Students Association received $1,134. An affidavit from their president states that the purpose of the organization is "to represent and promote the interests of Jewish law students through a series of social, educational, and cultural activities," primarily sponsoring speakers on topics of interest to law students. *Id.* at 94. The meetings involve no religious observance or prayer, and there is no evidence of proselytizing or other primarily religious activity.

The history of Black Voices is particularly instructive. In 1990-91, Black Voices applied for and received an appropriation from student activity fees. At that time, the organization's purpose was "to invite individuals to congregate for the intent of singing gospel and contemporary religious music." J.A. 75, 78. Because this activity was primarily cultural, the organization received funds, which were used to purchase equipment and apparel and to defray travel expenses. During the 1990-91 school year, members of Black Voices "engaged in internal discussion about the main purpose of the organization." *Id.* at 76. "Some members felt that the organization should confine itself to cultural activities, while other members felt that the focus of the organization was shifting from simply singing gospel music to assuming a more religious character." *Id.* When the latter view prevailed, Black Voices adopted a new constitution identifying the group's activities as primarily religious and thereafter did not apply for University funding. This episode is characteristic of the administration of the Guidelines. They have been in place for twenty-five years, and *Wide Awake* is the first group to raise any question about the meaning or validity of the exclusion of religious activities from University funding.

In summary, petitioners' allegation of discriminatory administration of the Guidelines is contrary to the University's express policy of excluding all religious activities from public funding, contrary to the facts as found by the district court, contrary to petitioners' own conduct in failing to contest those factual findings on appeal, and contrary to the evidence of record. At this point, petitioners should not be

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In 1990-91, the C.S. Lewis Society received $220. An affidavit from their president states that the organization's activities consist of weekly meeting during which members discuss essays, poems, and excerpts from novels. *Id.* at 102-03. The meetings involve no religious observance or prayer, and there is no evidence of proselytizing or other primarily religious activity.

allowed to advance a factually unsubstantiated, judicially discredited, and previously abandoned allegation of discriminatory administration.

In this Court, petitioners have gone outside the record to lodge with the Court an issue of *Al-Salam*, a newsletter published on two occasions by the Muslim Students Association. This submission seems designed to suggest -- in a forum where the allegation is difficult to contest -- that *Al-Salam* and *Wide Awake* are similarly religious and that the University's decision to fund the former and not the latter reveals its bad faith. See Pet. Brief at 5 n.2. This effort to litigate outside the record is contrary to the precedents of this Court. See *Russell* v. *Southard*, 12 How. 139, 159 (1851); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. 481, 486 n.3 (1986).

It is also contrary to sound judicial practice. Submissions outside the record necessarily will not have been tested for accuracy and completeness. This is a case in point, for petitioners have told only part of the story. *Al-Salam* and *Wide Awake* differ in content and, more dramatically, in context and history.

In 1990-1991, the Muslim Students Association received no University funding. They requested funding for the following year as a cultural organization and received a grant of $246. At the time that decision was made (in spring 1991), the Muslim Students Association had never published a newsletter of any sort. They represented, and there was no evidence to the contrary, that they did not seek funding for

any religious activity.[3] Publication of the inaugural issue of *Al-Salam* occurred in February 1992. To the best of the University's knowledge, the publication was not part of any campaign of religious exhortation or proselytizing.

Although publication of the first issue of *Al-Salam* can readily be defended as primarily cultural rather than primarily religious activity,[4] it is true that a few of the articles are

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[3]The Muslim Student Association budget request for 1991-1992 stated:

> "The MSA is planning to publish a newsletter targeting the university community because it feels that it is important for the university as a whole to become aware of Muslim culture and to recognize the diversity of lifestyles of Muslims around the world. Many Americans are misinformed about the Islamic people, and the group feels that an informative newsletter can help such people gain a greater understanding of the world's Muslims."

[4]Dispassionate examination reveals important differences in the content of the two publications. After reviewing three issues of *Wide Awake*, the Fourth Circuit remarked its "unflagging invocation of religious, specifically Christian, themes." 18 F.3d at 273; Pet. App. 7a. A footnote identified only one exception to that statement in three published issues. *Id.* at n.7. As the Fourth Circuit also noted, the Christian symbol of the Cross appears at the top of each page, and at the end of each article. *Id.*; Pet. App. 8a. By contrast, the bulk of the material in *Al-Salam* is not specifically religious but is more concerned with Muslim culture.

The difference in emphasis is revealed in the editorial statements of the two magazines. A "Letter from the Editor" in *Wide Awake*'s inaugural issue states its twofold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." J.A. 45 (*Wide Awake*, Nov./Dec. 1990, p. 2.) The editorial goes on to quote Biblical verses and to close with the "hope that the articles in this issue will inspire you to consider how the Bible applies to your own life today." *Id.* at 46. By contrast, the editorial statement in *Al-Salam* promises "stories and articles ... aimed at revealing the Muslim mentality" and an effort to "bridge the ever-widening gap between Islam and the West." *Al-Salam*, Feb. 1992, p. 2. The editorial closes with the "hope that this magazine presents an opportunity to gain some insight into our thoughts, cultures, and opinions." *Id.* Thus, although there are

specifically religious. When funding was sought for the following year, the first issue of *Al-Salam* was available for inspection, and the question of its religious content was raised. On receiving adequate reassurance on this point, the Student Council Appropriations Committee allocated $756 to the Muslim Student Association for 1992-1993. With this money, the students published a second and very different issue of *Al-Salam*. Not surprisingly, petitioners did not lodge this publication with the Court.[5] As inspection will confirm, the second issue of *Al-Salam* is quite plainly a cultural and current events newsletter. Although the first issue might be debatable, no one could characterize the second issue of *Al-Salam* as primarily religious. Thus, *at the most*, petitioners' attempt to go outside the record in this case shows an isolated, borderline, small-scale violation of the University's Guidelines that could not have been anticipated and that was corrected the next year. This history is in no way comparable to *Wide Awake*'s request for thousands of dollars in public funds to distribute thousands of copies of a magazine explicitly devoted to religious proselytizing. Nor does it establish systematic discrimination in the administration of the Guidelines.

Despite petitioners' attempt to confuse the issue,[6] the case before this Court is the case as it was litigated in the district court and the court of appeals. That case presented only one issue: whether the categorical exclusion of all

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similarities between the magazines, it would be reasonable to characterize publication of *Al-Salam* as primarily a cultural rather than religious activity.

[5]Accordingly, respondents have done so.

[6]This is the most charitable construction that can be put upon petitioners' attempt to offer the newspaper "testimony" of a student who was not even enrolled in the University at the time of the events in question and hence has absolutely no knowledge of the facts in this case. See Pet. Brief at 20-21 n.12.

religious activities from public funding violates the First Amendment. That is the only issue before the Court, and that is the issue we address below.[7]

SUMMARY OF ARGUMENT

Respondents' argument consists of three points:

First, in the expenditure of public funds, decisions based on the content of speech are familiar, necessary, and entirely legitimate. Routine academic decisions, such as the hiring and promotion of professors and the choice of courses for the curriculum, involve content-based evaluations of speech. To require that such decisions be made without regard to content would be to disable public universities from adopting or implementing educational policies. This the First Amendment does not require.

Second, the University of Virginia Student Activity Fee Funding Guidelines are reasonable. They exclude from funding religious, political, philanthropic, and social activi-

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[7]There are two other errors in petitioners' statement of the case. First, petitioners state that the refusal to fund *Wide Awake* "was based solely on the content of the publication." Pet. Brief at 8. That is incorrect. Representations by the group's officers were also considered. See J.A. 72-73 (Affidavit of Ronald J. Stump, Associate Dean of Students): "In public statements during the organization's application and appeal process, *Wide Awake* editors also acknowledged that the magazine has 'a Christian focus and a Christian editorial thrust,' that the editors want the magazine 'to glorify God', and that the organization 'opens each meeting with a prayer.'"

Second, petitioners state that there is no suggestion of mootness. Pet. Brief at 13 n.7. In fact, petitioner officers and editors have graduated, and the University has no evidence that the organization continues to be active. Additionally, petitioners' damages claim is barred by the Eleventh Amendment, which means that it does not support litigation of the merits.

ties. They do not reflect, as petitioners allege, an ideologically driven attempt to suppress a particular point of view.

Third, the public forum doctrine confirms the constitutionality of the funding Guidelines. Under that doctrine, student activity fee funds constitute a non-public forum. In the non-public forum, content-based rules are allowed, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The University Guidelines fully meet that standard.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT FORBID REASONABLE CONTENT DISTINCTIONS IN THE DISTRIBUTION OF PUBLIC FUNDS.

This case is not specifically about religion. The University of Virginia Student Activity Fee Guidelines do not focus exclusively on religion, nor do they treat religious activities differently from a variety of other activities found to be unrelated to the educational purpose of the University.

According to the Guidelines, student activity fees are "public funds which must be administered in a manner consistent with the educational purpose of the University ... ." Pet. App. 61a. To that end, certain organizations and activities are declared eligible for funding. These include, *inter alia*, the Student Council, student newspapers, cultural organizations, fine arts organizations, and service organizations. Other groups and activities are declared ineligible for funding. These include, *inter alia*, religious

organizations and activities, political organizations and activities, philanthropic activities, social entertainment activities, and organizations with exclusionary admission policies.

The Guidelines were challenged by *Wide Awake*, a student journal found ineligible for funding because it is a religious activity. The Guidelines could as easily have been challenged by a political organization (such as the Young Democrats or Young Republicans) or by persons engaged in lobbying or electioneering activity (such as publication of campaign literature), by a philanthropic organization, or even by a fraternity, sorority, or social club. All these groups would have been denied funding on precisely the same ground -- namely, that in the judgment of the Board of Visitors, their activities were not "related to the educational purpose of the University of Virginia" for purposes of funding. Moreover, all these groups could have challenged their exclusion from funding on precisely the same ground raised by *Wide Awake* -- namely, the claim that a content-based restriction on funding violates the First Amendment.[8] The same constitutional issue would be raised, regardless of whether the activity excluded from funding were religious, political, philanthropic, or social.

Not only do the University Guidelines not aim specifically at religion; they do not inhibit, impede, or penalize any religious activity. On the contrary, the University facilitates student religious and political activities, including publication of *Wide Awake*, by a variety of means short of funding. As

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[8] As a religious activity, *Wide Awake* could raise a Free Exercise claim not available to political or social organizations and activities. *Wide Awake* made such a claim in the trial court but abandoned it on appeal. 18 F.3d at 277 n.23; Pet. App. 16a n.23. In any event, the authority on which *Wide Awake* chiefly relies, *Lamb's Chapel* v. *Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), is a Free Speech case.

the Fourth Circuit declared, *Wide Awake*'s members have the "same access" to University facilities as all other student groups (including more than a dozen other religious organizations). They "are given generous run of University property for their work and programs" and enjoy "liberal recourse to [the University's] computer terminals, printers, and other equipment used to prepare manuscripts for publication." 18 F.3d at 278; Pet. App. 19a. With the University's consent and cooperation, *Wide Awake* has printed and distributed thousands of copies of its magazines on University grounds.

In short, the University has complied fully with *Lambs Chapel* v. *Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), on which petitioners rely. *Lambs Chapel* involved access to facilities, not funding of speech. The difference is crucial. When students seek access to facilities not otherwise in use, they seek a benefit that the school can distribute at virtually zero marginal cost. If the institution withholds a benefit that is practically costless to provide, its action can fairly be seen as an attempt to disadvantage -- in other words, as a form of discrimination. In limiting access to facilities, therefore, content-based distinctions are immediately suspect. That is the teaching of *Lambs Chapel*.[9]

Here, however, the issue is not access, but funding. Here the question is not whether the University will withhold a benefit that is costless to provide, but whether the University will incur cost to provide a benefit. Unlike classroom facilities, public funds will never equal the demands upon them. Choices must be made. In the context of a public

[9]In public universities, as in public high schools, classroom space is usually so plentiful that access for after-hours use need not be rationed. If space were scarce, it might well be appropriate, as Justice Stevens has said, to "evaluate the content of a proposed student activity" in setting priority of access. *Widmar* v. *Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in the judgment).

university, virtually every allocation of funds involves speech. The selection of courses for the curriculum, the provision of support for research, and the hiring and promotion of professors are obvious examples. If the First Amendment were construed to demand content-neutrality in funding, routine decisions would invite a lawsuit. Everyday academic determinations would trigger the search for a compelling interest, and judicial review would supplant academic decisions in the management of public universities. In short, to require that scarce dollars be distributed without regard to the content of speech would be to disable public universities from using public funds to pursue public policies. *Lambs Chapel* cannot reasonably be understood to require that result.

Public universities are not the only educational institutions engaged in content-based funding of speech. Public education at all levels routinely does the same. The selection of textbooks and the specification of topics to be covered necessarily involve such choices. Moreover, federal, state, and local governments fund a variety of centers, programs, and activities that involve speech. Content-based decisions involving the funding of expressive activities occur not only in schools, but in contexts ranging from public health campaigns for AIDS awareness to in-service publications by the U.S. military. None of these decisions is content-neutral, nor could they be if government is to retain the capacity to govern.

It is true, of course, that content-based funding decisions require line-drawing. And it is equally true that the difference between choices close to the line may not be the difference between night and day. But such choices are absolutely unavoidable. Any allocation of funds will require them. So long as the choices are made reasonably and without any invidious intent, they should be recognized as a

necessary feature of public education -- and indeed of government generally.

The difference between access and funding was recognized by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The *Widmar* Court rejected content-based limitations on access but explicitly excepted funding: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources ... ." *Id.* at 276. Without this limitation, *Widmar* and *Lambs Chapel* would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds.

This Court has not often heard First Amendment challenges to government funding. The dearth of precedent[10] reflects a principle so well established that it is

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[10]Petitioners rely chiefly on *Lamb's Chapel*, which concerns access, not funding. For the contention that the First Amendment requires content-neutrality in funding, petitioners rely on two circuit court decisions: *Gay & Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 361 (8th Cir. 1988), and *Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973). See Pet. Brief at 16-17. Both are inapposite.

Gohn involved the University of Arkansas's Student Senate's denial of funding to a gay rights group. Although the Eighth Circuit loosely used both "content" and "viewpoint" to describe the basis for the funding denial, the court plainly recognized that the denial involved blatant viewpoint discrimination based on discriminatory animus toward homosexuals. Similarly, *Joyner* involved a university president's withdrawal of financial support for the campus newspaper in retaliation for an editorial advocating black separatism. Like *Gohn*, *Joyner* is a clear case of ideologically driven viewpoint discrimination. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 211 (Blackmun, J., dissenting) (describing the regulations at issue there as unconstitutional because they were based on "ideological viewpoint" and accomplished an "intrusive, ideologically based regulation of speech" and therefore unconstitutional).

seldom questioned: When government funds speech, it may consider content. On the few occasions when this principle has been questioned, this Court's response has been emphatic and unequivocal.

The clearest example is *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983). That case involved a tax subsidy. Organizations qualifying as tax-exempt under § 501(c)(3) of the Internal Revenue Code are eligible to receive tax-deductible contributions. As this Court recognized, tax-deductible contributions amount to a government subsidy. *Id.* at 544. Under the Internal Revenue Code, § 501(c)(3) organizations cannot engage in substantial lobbying. Organizations that do engage in substantial lobbying can qualify as tax-exempt under § 501(c)(4), but this classification renders them ineligible for tax-deductible contributions. In *Regan*, the plaintiffs argued that withholding the subsidy of deductible contributions because they intended to engage in protected First Amendment activity violated their First Amendment rights. This Court unanimously rejected their claim, holding that the government's refusal to pay for lobbying activities did not violate anyone's rights. Speaking for the Court, Justice Rehnquist said: "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546 (quoting *Cammarano* v. *United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)); see also *id.* at 545 ("This Court has never held that Congress must grant a benefit ... to a person who wishes to exercise a constitutional right.").

Respondents agree that ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts, but that is not the issue here. Neither *Gohn* nor *Joyner* supports a general requirement of content-neutrality in funding, *nor does any decision of this Court*. There is a complete absence of any Supreme Court authority for the contention that government funding of expressive activities must be done without regard to their content. See p. 21 n.12, *infra*.

Regan's parallels with the instant controversy are exact. Here, as in *Regan*, petitioners argue that withholding a subsidy because they intend to engage in protected First Amendment activity violates their First Amendment rights. *Regan*'s unanimous ruling to the contrary disposes of that claim.

This much petitioners may concede. But what about the argument that, even though petitioners do not have a constitutional right to demand funding, they do have a right not to be "discriminated against" by denying to them funding provided to other activities? This argument was also considered and rejected in *Regan*. There, as here, plaintiffs claimed that selective funding was unconstitutional. But this Court unanimously rejected that claim. Speaking for the Court, Justice Rehnquist noted that the lower court had ruled against the government on the ground that the Internal Revenue Code made the subsidy of tax-deductible contributions available "on a discriminatory basis":

> "Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. This is not the law."

Id. at 548.

A clearer rejection of *Wide Awake*'s position can scarcely be imagined. Here petitioners (joined on this point by the Fourth Circuit) claim that strict scrutiny applies because the University subsidizes some speech but not all speech. As *Regan* declared: "This is not the law." Nor could it be, if state-supported colleges, schools, and universities are to retain any independence in deciding how to allocate public funds. Treating every government decision to fund speech as discrimination against all other speech and thus subject to "compelling interest" review would bring the

courts into close judicial scrutiny of everyday academic decisions, no matter how routine.

Note also that a condition deemed important by the *Regan* concurrence is fully satisfied here. Justice Blackmun, joined by Justices Brennan and Marshall, wrote separately to emphasize that plaintiffs were not required to give up lobbying to remain tax-exempt, but were free to qualify as tax-exempt under § 501(c)(4), which accords all the advantages of that status except the subsidy of tax-deductible contributions. *Id.* at 552-53 (Blackmun, J., concurring). The same is true here. *Wide Awake*'s members were not required to give up religious activities. They were free to qualify (and did qualify) as a contracted independent organization, which gave them all the advantages of that status (including use of University facilities), except the subsidy of appropriations from student activity fees.

The two cases are alike in another respect as well. The *Regan* plaintiffs were free to maintain two parallel organizations under §§ 501(c)(3) and (c)(4). *Id.* at 544. Thus, the fact that they engaged in substantial lobbying under § 501(c)(4) did not make them ineligible for the tax subsidy for non-lobbying activities under § 501(c)(3). The effect of these provisions was to withhold the government subsidy from lobbying activities, not to penalize anyone for engaging in such activities. The same is true here. *Wide Awake* was found ineligible for funding as a religious activity, but its members remained eligible for funding for any non-religious activities in which they might choose to engage. The fact that they took part in religious activities did not make them ineligible to receive funds for other activities. Again, the effect of the University's Guidelines is to withhold a government subsidy from religious activities, not to penalize anyone for engaging in such activities.

In short, this case and *Regan* are aligned as closely as any two cases could be. This Court's unanimous opinion in *Regan* settles the constitutionality of the University funding Guidelines.

The principle of *Regan* was reaffirmed in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). *Rust* followed a long line of cases holding that the constitutional right to abortion does not entail a right to government funding.[11] *Rust* applied those precedents to a federal regulation prohibiting recipients of federal funds for family-planning from counseling abortion or providing referrals for abortion. Chief Justice Rehnquist's opinion for the Court speaks directly to the case at hand:

> "Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program."

Id. at 194 (citations omitted).

Regan and *Rust* state the principle on which this case should be decided: The First Amendment does not forbid

[11] *Maher* v. *Roe*, 432 U.S. 464 (1977); *Poelker* v. *Doe*, 432 U.S. 519 (1977); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980); *Webster* v. *Reproductive Health Services*, 492 U.S. 490 (1989).

reasonable content-distinctions in the distribution of public funds. There is simply no precedent to the contrary.[12]

Indeed, even the dissenting opinions in *Rust* are completely consistent with the University's position in this case. The facts of *Rust* raised two concerns not present here.

[12] Petitioners rely on *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), which involved a First Amendment challenge to the Public Broadcasting Act of 1967, as amended. That statute authorized grants to noncommercial television and radio stations but prohibited all grantees from editorializing. The restriction did not apply only to government funds; it prohibited any grant recipient from using any funds for editorializing. In other words, the statute required broadcasters to give up editorializing in order to remain eligible for government money. As this Court explicitly noted, it was precisely this feature that rendered the statute unconstitutional. *Id.* at 399-401. By contrast, in this case, as in *Regan*, no one has to stop engaging in ineligible activities in order to receive funding for eligible activities. Had that been true in *League of Women Voters*, the case would have come out differently. *Id.* at 400.

(This Court made the same point in rejecting an "unconstitutional conditions" argument in *Rust* v. *Sullivan*. As the Court pointed out, "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197 (emphasis in original). The University Guidelines have no such feature. In the language of "unconstitutional conditions," the Guidelines involve no "condition," unconstitutional or otherwise.)

Petitioners also rely on *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), which is also inapposite. That case did not involve funding. Instead, it involved discriminatory taxation. As this Court has subsequently made clear, *Arkansas Writers' Project* is simply irrelevant to "a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Rust* v. *Sullivan*, 500 U.S. at 194-95.

Finally, as has been explained, petitioners rely on two Court of Appeals decisions involving ideologically driven attempts to suppress a particular point of view. That is not the case here. See p. 16 n.10, *supra*.

First, there was the question whether the agency regulations at issue in *Rust* were a permissible construction of the underlying statute. See *id.* at 204-07 (Blackmun, J., dissenting); *id.* at 220-23 (Stevens, J., dissenting); *id.* at 223-25 (O'Connor, J., dissenting). No such issue exists here, as the University's Board of Visitors has unquestioned authority to adopt funding Guidelines. VA. CODE ANN. § 23-69 *et seq.* (1950).

More importantly, *Rust* involved a very aggressive use of the power of the purse by an administration with a well-advertised hostility to abortion to restrict speech favorable to abortion. Although this restriction attached to funding, it is likely that the marginal cost of allowing funded facilities to provide abortion counseling or referral would have been slight. In these circumstances, it was possible to view the prohibition on abortion counseling as an ideologically based attempt to suppress a particular point of view rather than as a legitimate limitation on public funding. See *id.*, at 207-11 (Blackmun, J., dissenting).

In other words, *Rust* might have been thought (and by some Justices was thought) to raise an issue of unconstitutional viewpoint discrimination. As petitioners make a similar argument here, it is that question to which we now turn.

II. EXCLUSION OF RELIGIOUS ACTIVITIES FROM PUBLIC FUNDING IS NOT UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION.

Perhaps recognizing the ubiquity and inevitability of content distinctions in funding, petitioners try to portray the University Guidelines as a form of "viewpoint discrimination." They are aided in this effort by a certain plasticity in the terms. Viewed abstractly, "content" and "viewpoint"

are not completely distinct, and it is often possible to characterize one as the other. Thus, petitioners claim that the exclusion of all religious activities from public funding suppresses a particular view or perspective and therefore is "plainly discrimination on the basis of viewpoint." Pet. Brief at 19.

The key to this assertion is the assumption that all religious activities -- whether Christian, Muslim, Jewish, Hindu, Zoroastrian, Buddhist, or other -- embody a common view or perspective. On this reasoning, the exclusion of all political activities from public funding would also be viewpoint discrimination. The Guidelines define "political activity" to include lobbying and electioneering. Pet. App. 65a; cf. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). If all religious activities can be said to embrace a common view or perspective, then so can all lobbying (the view that social change should be effected through legislation) or electioneering activities (the view that participation in the electoral process is important and valuable). And so can philanthropic giving or social entertainment or any other category of activity. In fact, any exclusion from funding can be characterized as viewpoint discrimination simply by attributing to all speech within the excluded category a least-common-denominator view or perspective. The result is to render the concept of viewpoint discrimination circular and meaningless.

Of course, respondents do not deny that religious activities encompass particular views and beliefs, any more than one could deny that lobbying or electioneering or philanthropic activities encompass particular views and beliefs. But only by retreating to a level of vacuous generality can one assert that all religious activities (or all lobbying or electioneering or philanthropic activities) reflect the *same* view or perspective. Petitioners' argument goes too far. If an

across-the-board exclusion of all religious activities from funding amounts to viewpoint discrimination, then so does the exclusion of all lobbying, electioneering, or philanthropic activities. Indeed, if the exclusion of all religious activities from public funding constitutes viewpoint discrimination, then so does every categorical limitation on public funding of expressive activities. In short, petitioners' argument turns every content-based limitation on funding into unconstitutional viewpoint discrimination.

Even if petitioners' argument were arbitrarily limited to religion, its sweep would be revolutionary. Petitioners assert that the exclusion of religious activities from funding available to other activities amounts to unconstitutional discrimination against those "espous[ing] a religious view." Pet. Brief at 17. If that is true, every government at every level is guilty of it every day. Public schools throughout America teach history, science, math, languages, literature, and civics. They also fund student government, debate teams, various kinds of assemblies and field trips, and a wide variety of other programs. They do not teach religion. Of course, students may study religion "from the outside," in the same way they study history or philosophy. But public schools do not use public money to support religious exhortation or proselytizing. This is exactly the line drawn by the University of Virginia. If that line is unconstitutional, then so is the operation of every public school.[13]

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[13]As was noted previously, *Lamb's Chapel* is not to the contrary. That case involved access to school facilities, which the school district could have allowed at virtually no cost. That the school district instead barred presentation of religious views -- and only religious views -- from using available facilities was therefore discrimination. Here the University has provided complete access to facilities. All that the University has withheld is money. As was argued above, withholding public funding from religious activities -- and from political, philanthropic, and social activities -- cannot sensibly be seen as viewpoint discrimination.

Petitioners argument poses the same threat to higher education. The University of Virginia maintains a distinguished department of religious studies. That department provides instruction in religious thought and scholarship. It does not provide instruction in faith. Of course, the religious studies department does not discriminate against those who "espouse a religious view." Indeed, it seems likely that many professors and students are drawn to the study of religion by their faith. Nonetheless, the academic instruction is secular. The religious studies department does not offer courses in indoctrination or pastoring, nor does it hire persons whose accomplishments lie in those fields. In short, the University's funding of the religious studies department carries the same limitation that applies to student activity fees. If the latter is unconstitutional, then the former is also. And religious studies programs at every other public university would be similarly vulnerable.

Nor would the federal government escape the backwash of petitioners' argument. Federal funding programs typically exclude religion. Sometimes the exclusion is explicit, as in the statutory criteria for the award of graduate and professional fellowships. 20 U.S.C. §§ 1134-1134w (Supp. V 1993). Congress expressly provided: "No fellowship shall be awarded under this subchapter for study at a school or department of divinity." 20 U.S.C. § 1134b(3) (Supp. V 1993). Under petitioners' reasoning, this exclusion discriminates against those who wish to espouse a religious view and is therefore unconstitutional. Pet. Brief at 17. Similarly, the Child Care and Development Block Grant Act of 1990 declares that no financial assistance "shall be expended for any sectarian purpose or activity including sectarian worship or instruction." 42 U.S.C. § 9858k(a) (Supp. V 1993). This statute would also be unconstitutional if the exclusion of all religious activities were treated as viewpoint discrimination. And the same axe would fall on the Corporation for Public

Broadcasting (CPB), which prohibits grants for programming "designed to further the principles of religious philosophies." Corporation for Public Broadcasting, Eligibility Criteria for Television Community Service Grants para. 7(b) (Aug. 1992). Federal regulations also provide that the category of public television services eligible for CPB grants "does not include essentially sectarian programming." 15 C.F.R. § 2301.1 (1994). The parallels between these regulations and the University funding Guidelines could scarcely be more exact.[14]

More often, federal funding programs exclude religious activities simply by not declaring them eligible. For example, federal law authorizes the Secretary of Education to make grants "to establish and operate National Teacher Academies." 20 U.S.C. § 1103 (Supp. V 1993). The subjects for which such Academies may be established are limited to English, mathematics, science, history, geography, civics and government, and foreign languages. *Id.* at § 1103(b). Religion is not included.[15] A citation of comparable state and local funding programs that would be made vulnerable to constitutional attack by petitioners' argument on viewpoint discrimination would probably exhaust the fifty-page limit on briefs filed in this Court.

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[14]Federal law also provides that: "No noncommercial educational broadcasting station [which is publicly funded] may support or oppose any candidate for political office." 47 U.S.C. § 399 (1988). Again, federal law parallels the University Guidelines. Both stand or fall on the same reasoning.

[15]Cf. Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 Harv. L. Rev. 989, 1018 (1991) (suggesting that government's refusal to fund the secular component of education in church-related schools is constitutionally problematic but acknowledging that "it is just and proper for the government to refuse to pay the incremental cost of religious components of the education, in light of the conscientious objection many taxpayers have toward mandatory support for religious instruction").

Finally, the argument that excluding religious activities from funding equals unconstitutional viewpoint discrimination contradicts the essential rationale of the Establishment Clause. Although its opinion on this point is not entirely clear, the Fourth Circuit seems to have concluded that allowing religious activities to receive University funds would violate the Establishment Clause.[16] Petitioners attack this conclusion and urge this Court to overrule *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Hunt* v. *McNair*, 413 U.S. 734 (1973), and subsequent cases. As the Brief of the Baptist Joint Committee on Public Affairs, *et al.*, as Amicus Curiae demonstrates, there are substantial contrary arguments. However, the question whether the Constitution would *permit* the University to fund student religious activities is not necessary to the decision of this case. The true significance of the Establishment Clause for this litigation is clearer and less controversial.[17]

Despite the importance of content-neutrality in many contexts, it seems plain to the point of obviousness (as was argued above) that content-neutrality cannot be required in

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[16]The opinion does not make clear whether the Fourth Circuit concluded that allowing funding would actually violate the Establishment Clause or only that the substantiality of that question justified the refusal to withhold funds. See 18 F.3d at 281-87; Pet. App. 26a-39a.

[17]Although respondents do not think it necessary to address the hypothetical question whether the Establishment Clause would permit government aid to religion in this context, we note that in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), this Court upheld participation of religious-affiliated organizations in funding under the Adolescent Family Life Act precisely because there was no showing that the money would flow to "pervasively sectarian" organizations, *id.* at 610 *et seq.*, and remanded for the district court to determine whether in particular cases federal money had been used to fund "specifically religious activities." *Id.* at 621. Whether *Bowen* and similar cases should be interpreted to prohibit the University from funding religious activities may be an open question (as well as one not presented on these facts), but at least they flash a yellow light.

funding. The demand for funds will always outstrip resources. Allocations *must* be made. Insofar as petitioners object to all content-based criteria for the distribution of public funds, their claim is answered by necessity. It follows that the real basis for petitioners' suit must be the claim that, even though content-based judgments are inevitable in public funding, focusing on religious activity is not permissible. That is the import of petitioners' attempt to portray the denial of funding to religious activities as unconstitutional viewpoint discrimination. Yet surely, whatever else it may mean, the Establishment Clause at least shows that financial separation of church and state is not *un*constitutional. If, as petitioners (wrongly) contend, denying funding to religious activities is viewpoint discrimination, it is a viewpoint discrimination that the Constitution itself embraces -- and in some circumstances commands. At the very least, the Establishment Clause settles the constitutional *permissibility* of financial disengagement from religion.

Petitioners' contrary argument rests on a peculiar view of the Constitution. Basically, petitioners claim that University funding for *Wide Awake* is either constitutionally prohibited or constitutionally compelled. Either the Establishment Clause forbids funding of religious activities, or the Free Speech Clause commands it. In this scheme, all government interactions with religion are either prohibited or compelled; there is no middle ground. The result is to eliminate the authority of governments at all levels to set their own policies in any matter that may somehow affect religion.

Surely this is wrong. Surely not every interaction between government and religion is constitutionally dictated. Surely there is zone of reasonableness in which government action is neither so disadvantageous to religion as to violate Free Speech Clause (or Free Exercise Clause) nor so

advantageous to religion as to violate the Establishment Clause. Surely there is some room left for non-judicial decisionmaking. Yet petitioners' argument would extend one constitutional guarantee right up to the boundary of the other, thereby transforming every public policy that somehow intersects religion into a question of constitutional law that can be resolved only after extensive litigation. The extravagance of such a position is one more reason to reject petitioners' effort to characterize the exclusion of religious activities from funding as unconstitutional viewpoint discrimination.

Respondents emphasize, however, that a complete theory of the Establishment Clause or its relation to other constitutional guarantees is not necessary to the decision of this case. The fundamental objection to petitioners' argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds.

III. THE CONSTITUTIONALITY OF THE STUDENT ACTIVITY FEES GUIDELINES IS CONFIRMED BY THE PUBLIC FORUM DOCTRINE.

The fundamental distinction between suppression of speech and the refusal to subsidize speech is not missing from the precedents of this Court. It is stated most clearly in cases dealing explicitly with funding. See *Regan* v. *Taxation With Representation*, *supra*; *Rust* v. *Sullivan*, *supra*. It is also reflected in the long line of cases dealing with access to government property for expressive activity. These cases define the doctrine of the public forum.

The public forum doctrine guarantees content-neutral regulation of speech in streets, parks, and other public spaces that "time out of mind, have been used for purposes of

assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). In a true public forum, the government can limit the time, place, and manner of speech, but can exclude speech based on content only if it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Content-neutrality also must prevail in those "limited" public forums that the government voluntarily opens to expressive activity. *Id.* at 45-46. Limited public forums may be created in particular places or activities. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (municipal theater); *City of Madison Joint Sch. Dist.* v. *Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (school board meetings).

When a state-supported university voluntarily opens its facilities for after-hours use by student groups, it creates a limited public forum. *Widmar* v. *Vincent*, 454 U.S. at 264-70. For so long as the limited public forum is held open, the university cannot enforce content-based exclusions of speech absent a compelling interest. This principle explains *Widmar* and *Lambs Chapel*. It governs questions of access to university facilities -- a benefit that can be provided at practically no marginal cost. The University of Virginia has complied fully with the teachings of *Widmar* and *Lambs Chapel*. Indeed, the University has gone beyond the requirements of those cases in making available for the publication of *Wide Awake* (and other religious, political, etc., activities) not only access to University buildings but to the University's computers and printers.

In contrast, the appropriation of public moneys can never create a limited public forum. There can be no principle of open access to funds, because the funds will never equal the demands upon them. Every dollar given to one program or activity cannot be given to some other program or activity; there is no benefit, like access to otherwise unused facilities, that can be made available without rationing. It follows that in funding, unlike access, rules of inclusion and exclusion are not only legitimate but inevitable, a necessary consequence of scarce resources. To require that funding decisions be content-neutral would cripple government and lead to a kind of fiscal anarchy.

The fundamental distinction between funding and access was recognized in *Widmar*, where the Court required content-neutrality in access but explicitly disavowed any intent to "question the right of the University to make academic judgments as to how best to allocate scarce resources ... ." 454 U.S. at 276. The point was amplified by Justice Stevens in concurrence, *id.* at 278:

> "In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities."

As both the Court and Justice Stevens recognized, in the distribution of scarce resources, content distinctions are familiar, legitimate, and necessary.

It follows that the appropriation of public moneys is not a public forum, limited or otherwise. It is rather, as the district court in this case correctly found, a "non-public forum." 795 F. Supp. at 178-81; Pet. App. 46a-53a. Accord *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that the allocation of moneys collected from federal employees by the Combined Federal Campaign is a non-public forum).[18] The category of the non-public forum refers to government property (here student activity fees) that is not voluntarily opened to all comers. In the non-public forum, the government can set priorities and pursue policies, and it can do so by reference to the content of funded speech. The scope of the government's authority in non-public forums was spelled out by this Court in *Perry Education Ass'n*, 460 U.S. at 46:

> "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

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[18]Indeed, *Cornelius* goes farther than the University Guidelines. Contributions to the Combined Federal Campaign are voluntary and may be designated for particular recipients. In this scheme, content-based limitations on the receipt of funds are not strictly necessary; it would be possible for the government to facilitate the voluntary contributions of federal employees without any governmental rules of allocation. Student activity fees, by contrast, are mandatory. They are collected like taxes, and like the distribution of revenues raised by taxes, there *must* be official control over the distribution of scarce resources. Those decisions might be made by general rule, such as the Guidelines, or by case-by-case application, such as appearances before the Student Council Appropriations Committee, or by a combination of both. One way or another, some official allocation of funds is absolutely inevitable in this case, unlike in *Cornelius*. In light of these (and other) differences, the concerns voiced by the *Cornelius* dissenters are inapplicable here. See 473 U.S. at 813 (Blackmun, J., with whom Brennan, J., joined, dissenting); *id.* at 833 (Stevens, J., dissenting).

Here the University of Virginia has completely met the standard for regulation of speech in a non-public forum. It has established a mechanism for allocating funds raised by student activity fees. This mechanism is exactly comparable to the appropriations process used by governments at all levels. It necessarily involves decisions based on the content of the activities funded. At the University of Virginia, those judgments are made retail by the Student Council Appropriations Committee, which decides whether particular applicants will receive all, some, or none of the amounts requested. Funding decisions are also made wholesale by the Board of Visitors. The Board has identified certain broad categories of activities for which funding would be consistent with the educational purpose of the University and other broad categories of activities for which funding would not be consistent with the educational purpose of the University. The exclusion of religious, political, philanthropic, and social activities from University funding is plainly reasonable. It may be that different eligibility requirements would also be reasonable. It may be that petitioners or their amici might prefer different rules. But the governance of the University is lodged by statute with the Board of Visitors, and the policy adopted by the Board is plainly reasonable. That is all the law requires.

Petitioners make much of the fact that the exclusion of "primarily" religious activities from funding requires line-drawing. Of course it does. So does every funding policy. If petitioners were able to force the University to allow funding for religious (and political, etc.) activities, line-drawing problems would be multiplied down the road. The Student Council Appropriations Committee would have to decide which religious activities to fund and in what amounts. It would have to decide whether to consider only the number of students involved in each activity (which would encourage padding of membership rolls) or to evaluate

the contribution of each activity to the University community. Who knows how such determinations would be made? Similar difficulties would arise in funding political activities. To which campaigns should the University give money? In what amounts? Obviously, the "solution" of allowing all groups to be eligible for funding would not cure the problems of line-drawing in allocating funding; if anything, it would make them worse.

Finally, the exclusion of certain broad categories of organizations and activities from University funding is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. That is obvious from the generality and impersonality of the funding Guidelines[19] and from the long tradition of financial disengagement between government and religion. In truth, the excluded organizations and activities do not share any common view, except at such a high level of abstraction as to be meaningless. Moreover, both the District Court and the Court of Appeals found that the administration of the Guidelines did not reveal any effort to suppress a particular point of view. The public forum doctrine thus confirms that the University's funding Guidelines are fully consistent with the First Amendment and with the decisions of this Court.

CONCLUSION

As was stated at the outset, this case is not specifically about religion. It is, rather, about the ability of public education at all levels to set priorities for the use of public

[19]Cf. *Gay & Lesbian Students Ass'n* v. *Gohn*, *supra*, and *Joyner* v. *Whiting*, *supra*, in both of which the denial of funding was quite specifically targeted at an officially disfavored group or opinion.

funds. The University of Virginia's decision to fund only those activities closely related to the educational purpose of the University is both right and necessary. The University's decision to implement that policy by withholding funds from all religious, political, philanthropic, and social activities is a reasonable content-based limitation on public funding. It does not represent any sort of ideologically driven attempt to suppress a particular point of view. Consequently, the University funding Guidelines should be upheld.

Respectfully submitted,

JOHN C. JEFFRIES, JR.
University of Virginia
School of Law
Charlottesville, VA 22903
(804) 924-3436

JAMES J. MINGLE*
C. LYNN LAWSON
University of Virginia
Office of the General Counsel
Post Office Box 9015
Charlottesville, VA 22906
(804) 924-3586

*Counsel of Record

Counsel for Respondents.

No. 91-329

1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

MICHAEL W. MCCONNELL *
ALAN E. UNTEREINER
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400, ext. 102
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

Having argued at every stage of this litigation (including its opposition to certiorari) that extending SAF funding to *Wide Awake* magazine would violate the Establishment Clause, and having prevailed on that argument in the court below, the University now abandons the argument in its brief on the merits. Resp. Br. 27 & n.17. The University leaves to its assorted *amici curiae* the task of addressing the question on which this Court granted certiorari. Instead, the University presents an alternative ground for affirmance: that the Fourth Circuit erred in holding that its discrimination between religious and secular viewpoints "violates the Speech and Press Clause" (Pet. App. 34a). We will turn first to the University's argument, and then to the *amici*'s arguments for affirmance on the Establishment Clause issue.

I. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT A PUBLIC UNIVERSITY MAY NOT DENY FUNDING TO AN OTHERWISE ELIGIBLE STUDENT PUBLICATION ON THE BASIS OF ITS EDITORIAL VIEWPOINT

1. The University begins the "Argument" section of its brief with an 11-page attack on a straw man: "The First Amendment does not forbid reasonable content distinctions in the distribution of public funds." Resp. Br. 12.

> In the context of a public university, virtually every allocation of funds involves speech. The selection of courses for the curriculum, the provision of support for research, and the hiring and promotion of professors are obvious examples. If the First Amendment were construed to demand content-neutrality in funding, routine decisions would invite a lawsuit.

Resp. Br. 14-15. Warming to its theme, the University warns that a contrary holding would become "a judicial juggernaut" (*id.* at 16), subjecting "[e]veryday academic determinations * * * [to] judicial review" under a "compelling interest" test. *Id.* at 15.

The short answer to this is that petitioners have argued no such thing. It is not our position that heightened judicial scrutiny should apply to the *government's own speech*—including a university's curricular decisions. Rather, as we explained in our opening brief (at 25-29), there is a fundamental distinction, for purposes of both the Free Speech and the Religion Clauses, between government speech (including the University's curricular decisions) and private speech. This distinction, ignored by the University, is well established in this Court's precedents. See *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267, 271-72 (1988) (distinguishing between student newspapers that are part of the public school curriculum and private activities of students); *Waters* v. *Churchill*, 114 S. Ct. 1878, 1886-88 (1994) (explaining difference in government's latitude to control the speech of its employees and agents, as opposed to the private speech of private individuals); *Board of Education* v. *Mergens*, 496 U.S. 226, 250 (1990) (distinguishing between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original); see generally Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U. L. Rev. 1 (1986). We showed in our opening brief (at 27) that under the University's own Guidelines and Contract with CIOs, student groups receiving SAF funds are *not* agents or employees of the University, are *not* part of the curriculum, are *not* under the control of the University, and thus plainly fall on the "private" rather than the "governmental" side of this fundamental line. The University does not challenge this conclusion and, in light of its own explicit statements and policies regarding CIOs (see J.A. 26-29), it cannot.

Even with regard to government benefits to private speakers, it is *not* our position that all "content discrimination" triggers strict scrutiny. We do not question the discretion of the University, if it chooses, to fund poetry magazines and not comic books, science journals and not

history journals. This case is not about mere content discrimination; it is about viewpoint discrimination. Our position is that insofar as a public institution undertakes to subsidize a particular category of expression (in this case, "student news, information, opinion, entertainment, or academic communications media groups" (Pet. App. 61a, ¶ 4)), it may not single out a particular viewpoint or viewpoints within that category for discriminatory exclusion.

Indeed, the University does not disagree with us (or the Fourth Circuit) about this legal principle, as a careful reading of the footnotes in the University's brief reveals. Resp. Br. 16 n.10. The University concedes that it may not deny funds to an otherwise eligible student group on the basis of "viewpoint discrimination." *Ibid.* It endorses the holdings of the lower court cases on which we rely: *Gay & Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 361 (8th Cir. 1988), and *Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973), which held that a public university could not deny funding to a gay rights group (*Gohn*) or a newspaper advocating black separatism (*Joyner*).[1]

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[1] We note that the University's paraphrases of the courts' holdings regarding viewpoint discrimination are couched in restrictive adjectives and adverbs that do not appear in the cases. It describes the discrimination in *Gohn* as "blatant viewpoint discrimination based on discriminatory animus toward homosexuals." Resp. Br. 16 n.10. It describes *Joyner* as "a clear case of ideologically driven viewpoint discrimination." *Ibid.* To the extent that it is suggesting that viewpoint discrimination is permissble unless it is "blatant," "ideologically driven," or "based on discriminatory animus," the University is mistaken.

Neither in *Lamb's Chapel* nor in any other viewpoint discrimination case has this Court insisted on evidence of discriminatory animus. See *Simon & Schuster* v. *New York Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (plaintiff asserting free speech claim based on content or viewpoint discrimination is not required to prove "improper censorial motive"); accord, *Leathers* v. *Medlock*, 499 U.S. 439, 446 (1991). And subtle as well as "blatant" forms of viewpoint discrimination are unconstitutional. *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2547-48 (1992).

In its Brief in Opposition at the certiorari stage (at 15), the University stated flatly, without qualification, that "public universi-

Since the University does not seriously dispute the proposition that viewpoint discrimination is forbidden in the context of funding, as well as of facilities (Resp. Br. 16 n.10), it is unnecessary to respond in detail to its lengthy discussion of *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Both cases reaffirm the proposition that the government may not discriminate on the basis of viewpoint in the distribution of public funds; both cases were decided on the ground that the programs involved did not involve viewpoint discrimination. *Regan*, 461 U.S. at 548; *Rust*, 500 U.S. at 193, 194. Indeed, *Regan* did not even involve content-based discrimination, but only speaker-based discrimination. *Regan*, 461 U.S. at 548 ("the veterans' organizations that qualify under § 501 (c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use"). Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2466-67 (1994).

Rust is particularly inapposite to this case. In *Rust*, the government did not distribute subsidies to a broad range of private speakers without regard to the content of their speech. Rather, the grantees under Title X were specifically selected to carry out specific governmental services, including support for family planning. This was the government's own message. As we explained in our opening brief (at 28), when the government distributes funds to grantees for dissemination of the government's message, it is entitled to impose reasonable restrictions on the use of those funds, so that its message is not diluted or obscured by inconsistent or distracting messages from the grantee. This bears no resemblance to the SAF program, in which the University provides a general subsidy to a broad range of speakers to promulgate messages of their own choosing, and expressly disavows any association with the content of their speech. See J.A. 26.

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ties may not deny funding to student groups or publications on the basis of their viewpoint." Indeed, the University described this principle as "obvious." *Ibid.*

In sum, the first section of the University's brief is essentially irrelevant. The parties agree that viewpoint discrimination is presumptively invalid in the context of government funding of private speech. That is what this case is about.

2. The third section of respondents' brief (at 29-34) adds nothing to this analysis. Even assuming that the "public forum" doctrine applies to the free speech issue in this case, it is common ground that no matter what kind of forum is involved, the government may not engage in viewpoint-based discrimination. As the Seventh Circuit recently explained in *Hedges* v. *Wauconda Community School Dist.*, 9 F.3d 1295, 1297-98 (7th Cir. 1993), rejecting an argument similar to the University's:

> The first amendment's ban on discriminating against religious speech does not depend on whether the school is a "public forum" and, if so, what kind * * *. Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

Thus, depending on the nature of the forum, the government may be able to limit speech to certain categories, but it does not have the authority to discriminate against particular viewpoints within those categories. *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985); *Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983).

3. The University's argument therefore rests entirely on the second section of its brief (at 22-29), which makes the rather desperate argument that discrimination against publications on the basis of their religious editorial perspective is not viewpoint discriminaton. That argument is contrary to both common sense and clear precedent.[2]

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[2] Even if this were "mere" content discrimination, it is far from obvious that it is "reasonable" for the University to discriminate against religious speech when it allows secular and even anti-

a. The University's claim that it is not engaged in viewpoint discrimination is, to say the least, counter-intuitive. A black separatist newspaper has a constitutionally protected right to express its views on the subject of racism (as held in *Joyner*, which the University concedes is correctly decided), but *Wide Awake* forfeits its right to funding if it expresses its views on the same subject (see "A Simple Answer to Racism," *Wide Awake*, Nov./Dec. 1990, at 12). A gay rights group has a constitutionally protected right to express its views on a subject like "Homosexuals: Can They Change . . . And Should They?", *Wide Awake*, Mar./Apr. 1991, at 14 (as held in *Gohn*, which the University concedes is correctly decided), but *Wide Awake* does not. If this is not discrimination on the basis of viewpoint, we do not know what is.

In the Guidelines, the Rector and Visitors determined that certain student activities "relate to the educational purpose of the University and thus are eligible for funding." Pet. App. 61a. Among these are "student news, information, opinion, entertainment, or academic communications media groups." *Ibid.* The University evidently considers student publications worthy of support because the experience of writing and communicating ideas is educationally valuable in itself, independent of the nature of those ideas, since the University places no restrictions on content (other than the "religious activities" limitation). Sometimes debate in a college environment gets pretty crazy, and the University surely would not say that all of the ideas and opinions expressed by funded groups are "educational" in the sense of being well-reasoned or well-informed. The educational value is in "exposing the student body to various points of view on significant issues." *Arrington* v. *Taylor*, 380 F. Supp. 1348, 1362-63 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

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religious speech on the same subjects. J.A. 38, ¶ 16. See *Widmar* v. *Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring).

Wide Awake is unquestionably a "student news, information, opinion, entertainment, or academic communications media group." It addresses issues not unlike those addressed by other student publications: racism, books and music, the views and experiences of professors, educational issues, homosexuality, eating disorders, fear of flying, crisis pregnancies, and the like. There is no reason to think that the students who write and edit this publication, or those who read it and debate its contents, are receiving any less educational benefit than those who write, edit, and read publications that have a different editorial slant. Some may be better written, more sophisticated or erudite; some are plainly less so. But the University does not purport to make the funding decision on grounds of journalistic quality. The sole reason for exclusion of *Wide Awake* was its religious point of view.

b. The University does not purport to exclude the *subject matter* of religion from funded publications. (An entire issue of one funded magazine, *Thoughtlines*, was devoted to "Faith and Reason.") The Guideline against "religious activities" is framed not in terms of subject matter but of opinion or belief. See Pet. App. 66a ("religious activit[ies]" are those "which primarily promote[] or manifest[] a particular belief(s) in or about a deity or an ultimate reality"). Indeed, if the restriction were framed in terms of religious subject matter, it might not even apply to *Wide Awake*. Most of the articles in *Wide Awake* are not *about* religion, but present a religious *perspective* on a variety of subjects (racism, eating disorders, etc.). See Pet. Br. 6-7.

c. The University's argument that the exclusion of religious activities is not viewpoint discrimination is foreclosed by this Court's unanimous decision in *Lamb's Chapel* v. *Center Moriches School Dist.*, 113 S. Ct. 2141 (1993), which explicitly held that the exclusion of "religious purposes" is "based on viewpoint." *Id.* at 2149. See also *id.* at 2147 ("That all religions and all uses for religious purposes are treated alike * * * does not answer the critical question whether it discriminates on the basis

of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint"); *ibid.* (stating that denial of permission to exhibit film on ground that "the presentation would have been from a religious perspective" is "plainly invalid" viewpoint discrimination). The University Guidelines here are identical in form and substance to the regulations invalidated in *Lamb's Chapel.* See Note, 108 Harv. L. Rev. 507, 510 n.25 (1994) (analyzing this case under *Lamb's Chapel*).

In a footnote (at 24 n.13), the University attempts to distinguish *Lamb's Chapel* on the ground that it "involved access to school facilities" rather than funding. See also Resp. Br. 14. But that distinction is irrelevant to the underlying question of whether the exclusion of religious activities constitutes viewpoint discrimination. The University concedes (*id.* at 16 n.10) that viewpoint discrimination is forbidden in the context of funding as well as facilities. The significant holding of *Lamb's Chapel* for present purposes is that the exclusion of an otherwise eligible organization on account of its "religious purpose" or "perspective" constitutes viewpoint discrimination. To that, the University has no answer.

d. Given the inherent implausibility of the University's argument and its inconsistency with *Lamb's Chapel*, one would expect the University to provide at least a clear logical argument in support of its position. But the only argument we can discern is that the prohibition on "religious activities" cannot be a viewpoint-based category because the various religious faiths do not "embody a common view or perspective." Resp. Br. 23; see also *ibid.* ("Of course, respondents do not deny that religious activities encompass particular views and beliefs, * * * [b]ut only by retreating to a level of vacuous generality can one assert that all religious activities * * * reflect the *same* view or perspective.") (emphasis in original).

No one claims that all religions have the "*same* view or perspective." The genus "religion" obviously has many

species. But the government may not discriminatorily exclude groups or families of viewpoints from otherwise available general benefits, any more than it could exclude a single viewpoint (if there is any such thing as a single viewpoint). The term "Marxist" includes such disparate perspectives as democratic socialists, Maoists, and Trotskyists—but no one would say that the exclusion of "Marxist activities" would be anything other than viewpoint discrimination.

e. Finally, the University supports its argument by invoking the slippery slope. If viewpoint discrimination against religious speakers is impermissible, the University says, then various limitations embodied in federal statutes would be unconstitutional. Resp. Br. 25-26. Without knowing more about these programs, we are not sure whether they embody viewpoint discrimination or not. The question in each instance is whether the government is excluding otherwise eligible participants from a program on the basis of their religious orientation, while allowing similarly situated participants to espouse secular ideological or philosophical viewpoints. We doubt that the University's examples are of that type—but if they are, we stick by our argument.

4. In one important respect, the University's argument is extremely misleading. The Argument section of its brief begins with the statement that "[t]his case is not specifically about religion" (Resp. Br. 12), notes that certain other categories of activity (in addition to "religious activities") are excluded from eligibility for funding, and then states that "[t]he same constitutional issue would be raised, regardless of whether the activity excluded from funding were religious, political, philanthropic, or social." *Id.* at 13. This is simply not true.

Most of the excluded categories have nothing to do with viewpoint, or even with speech content. Philanthropic organizations and fraternities and sororities are defined by what they do and who they are—not by what they say. An otherwise eligible student newspaper would not lose its funding eligibility because it advocated philan-

thropy or addressed campus issues from a "Greek" point of view.

The only other provision of the Guidelines that has any relation to viewpoint is the prohibition on "political activities." The University conveniently fails to mention that the definition of "political activities" in the Guidelines expressly precludes application to "any otherwise eligible student organization which * * * espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." Pet. App. 66a.[3] This shows that—contrary to the University's assertions—religious viewpoints are *not* treated in the same way as political viewpoints (let alone "philanthropic" or "social" viewpoints). An otherwise eligible student publication will be denied funding if its viewpoint is "religious," but not if its viewpoint is "political."

Indeed, one way for the University to conform its Guidelines to the dictates of the First Amendment (as petitioners see them) would be to amend the definition of "religious activities" to make it parallel to the definition of "political activities," as follows:

> These restrictions on funding religious activities are not intended to preclude funding of any otherwise eligible student organization which espouses particular positions or religious viewpoints, including those that may be unpopular or are not generally accepted.

All we ask is that religious viewpoints be given the same treatment as other political, ideological, or philosophical points of view.

5. Toward the end of its brief (at 28), the University argues that "the Establishment Clause settles the constitutional *permissibility* of financial disengagement from religion"—even if it does not *require* the University to exclude religious viewpoints. This seems to us an especially

[3] The "political activities" prohibition applies only to lobbying on specific legislation and electioneering on behalf of candidates for public office. Pet. App. 65a. It does not apply to editorial perspectives of student publications.

pernicious notion. Since it would not be cabined by the *actual* dictates of the Establishment Clause, such a principle would allow the government to discriminate against religious speakers and citizens virtually at will in any matter with "financial" implictions—justifying its discrimination by appeal to undefined notions of disestablishment. But the Establishment Clause (like the rest of the First Amendment) was designed to *restrict* the powers of government in the field of religion. It would be ironic indeed if it were read as a license to governments to invade what would otherwise be the First Amendment rights of religious citizens.

This Court has repeatedly rejected arguments that the government should be given latitude to invade free speech or free exercise rights in order to "achiev[e] greater separation of church and State" than is required by the Establishment Clause. *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). In each of the cases in which the free speech rights of religious speakers were pitted against the supposed strictures of separation between church and state—*Widmar*, *Mergens*, and *Lamb's Chapel*—this Court examined whether the exclusion was required by the Establishment Clause, and upon concluding that it was not, enforced the free speech rights of the religious speakers. In no case did the Court suggest that the Establishment Clause creates a discretionary zone in which the government is free to discriminate against religious speakers.

6. We end where the University begins (Resp. Br. 1-11): with the funding of the Muslim Students Association, the Jewish Law Students Association, and other seemingly religious student activities. Contrary to the University's characterization of the procedural history of this case (at 1-5), petitioners' argument based on these facts has never been confined to the Equal Protection Clause. Rather, throughout this litigation, we have maintained that each of the relevant constitutional provisions (speech, press, free exercise, equal protection, and establishment) is offended *both* by discrimination among religious *and* by discrimination between religion and nonreligion. Nor have we divided our argument into a "facial

challenge" and an "as applied" challenge. Rather, our contention has been that the line between "religious" and other (including "cultural") activities is inherently arbitrary, that it is highly susceptible to discriminatory application, that its enforcement creates an excessive entanglement between church and state, and that it has in fact produced discrimination among religious groups at the University. The only response we have received from the lower courts to these arguments is that we have not proven "discriminatory intent." Our response, all along, has been that there is no requirement of proof of discriminatory intent under the claims we have raised.

We stand by all these arguments. They are fully supported by the record. The University struggles mightily to show why the funded activities are not as "religious" as *Wide Awake*. See, *e.g.*, Resp. Br. 9 n.4. We see these differences as bearing more on style than on religiosity; Scottish Presbyterians are not less "religious" than Pentecostals just because they are more restrained and taciturn. But the point here is not whether the University is right or wrong. It is whether such lines can be drawn non-arbitrarily, without a degree of surveillance and intrusion that violates the principles of neutrality and nonentanglement.

II. THE ESTABLISHMENT CLAUSE DOES NOT BAR RELIGIOUS SPEAKERS FROM PUBLIC BENEFITS GENERALLY AVAILABLE TO A WIDE ARRAY OF BENEFICIARIES ON AN EQUAL BASIS, WITHOUT REGARD TO RELIGION

For the most part, the University's *amici* on the Establishment Clause issue make arguments anticipated and answered in our opening brief. The arguments center around history, precedent, the meaning of neutrality, and the autonomy of religious organizations. Since we dealt with precedent at length in the opening brief, we will focus here on the other issues.[4]

[4] We must note, however, that virtually all of respondents' *amici*, and respondents themselves (Resp. Br. 27 n.17), treat *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), as the most directly pertinent case. The decision in *Kendrick* is entirely consistent with our understanding of the Establishment Clause. In *Kendrick*, the government did not distribute funds to a wide range of speakers in order to disseminate ideas of their own choosing. Rather, it made a limited number of grants (two per state per year) to organizations thought best able to convey the *government's own message*: namely, the importance of adolescent sexual self-discipline. When the government itself is speaking (whether directly or through private grantees), it is under an obligation not to take sides on religious issues. By contrast, when the government is using its resources to facilitate a broad and diverse array of *private* speech, its obligation is to allow uninhibited, robust debate without viewpoint-based limitations.

1. *Amici* make a great deal of the controversy over religious assessments in Virginia in 1784-85. But they fail to note the vast difference in context and principle between a proposal to impose a tax "for the support of teachers of the Christian religion" and a tax for the support of student newspapers and expressive activities of every conceivable stripe and opinion.[5] They do not point to a single instance in which a participant in the debates during the founding period argued that a generally available public benefit should be denied to any person or group on account of the religious character of their speech. From the proposition that the power of the purse must not be used to favor religion it does not follow that the power of the purse must be used to disfavor religion.

It is telling that Jefferson's statement—"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sin-

[5] Several *amici* (Americans United Br. 14 n.19; see also Baptist Joint Comm. Br. 7) claim that "Petitioners are incorrect in characterizing the Virginia assessment as benefitting religion solely. Undesignated tax monies would have gone to fund schools." But since the "schools" referred to in the Act were public schools, those who did not pay the religious tithe were, in effect, required to pay extra taxes to the government. They did not have the option of supporting secular (or indeed, non-Christian) speech of their choice.

ful and tyrannical"[6]—did not distinguish between religious and nonreligious opinions. According to Jefferson's principle, it is no less objectionable for the state to force dissenting citizens to pay for animal rights, gay rights, or Federalist Society advocacy than to force them to pay for *Wide Awake*.[7] Thus, there is some logic to the position of *amicus* Pacific Legal Foundation that the entire mandatory student activities fee is unconstitutional insofar as it compels support for controversial political or religious viewpoints. But student activity fee programs of this sort have been uniformly upheld on the theory that they are not supporting any *particular* opinions, but instead foster the exchange of diverse opinions. See cases cited in our opening brief (at 16 n.9). An essential element in this rationale is that the program must be genuinely open to all perspectives of the student body; the University must not skew the debate in any particular direction, whether religious or nonreligious. It seems to us that the Jeffersonian principle is satisfied by funding no one or by funding everyone pursuant to neutral criteria, but is violated when particular viewpoints are singled out for favorable or disfavorable treatment, as they are here.

2. This historical argument is directly related to the *amici*'s theoretical argument about the meaning of neutrality. Petitioners and respondents' *amici* emphatically agree that the government must be neutral toward religion. The dividing issue is this: the *amici* seem to think that the meaning of neutrality is determined by the character of the public benefit in question, while petitioners maintain that the meaning of neutrality depends upon the principle by which the benefit is distributed.

Thus, we maintain that in determining whether distribution of a benefit is "neutral" toward religion, the

[6] Virginia Bill For Establishing Religious Freedom, quoted in Baptist Joint Comm. Br. 3-4.

[7] This Court has frequently cited Jefferson's statement in the context of compelled support for purely secular advocacy. See, *e.g.*, *Keller* v. *State Bar of California*, 496 U.S. 1, 10 (1990); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977).

court must examine the range of eligible beneficiaries under the terms of the program. If the benefit "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end" (*Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989)), then the program is neutral; but if religious organizations are singled out for special benefits, or the eligibility criteria are "skewed towards religion" (*Witters* v. *Department of Services*, 474 U.S. 481, 488 (1986)), then the program is not neutral.[8] In making this determination, it does not matter what the public benefit in question may be (tax breaks, police and fire service, access to facilities, tuition tax credits, money for vocational education, bus rides, or whatever). *All* benefits (even meeting rooms) entail some cost to the taxpayer and confer some advantage on the user. Nor does it matter how "religious" the recipient is, so long as it conforms to the neutral, generally applicable terms of the program. *Texas Monthly* involved periodicals no less religious than *Wide Awake*, and *Witters* involved a pervasively sectarian school. *Walz* involved a church. None was required to stifle its religious message as a condition for eligibility.

The *amici*, by contrast, say that the neutrality analysis shifts according to the nature of the benefit in question. Thus, they agree that for some valuable benefits (tax benefits, access to facilities, direct aid to students), the question of neutrality is determined by whether religion is given special preference. But when it comes to other forms of aid (in this case, payments to third parties for printing costs), they say that inclusion of religious speakers would be an unconstitutional "advancement." This line of argument, however, is nothing but incoherent baseline-shifting. *Relative to government inaction*, religious activities are "advanced" whenever they are permitted to share in the fruits of public benefits. But *rela-*

[8] If a program is not neutral toward religion in this sense, it may nonetheless be constitutional as a permissible accommodation of religion. *Texas Monthly*, 489 U.S. at 15; 18 n.8.

tive to the treatment of other speakers, religious speakers are disadvantaged if they are excluded from benefits that are extended to their secular competitors in the marketplace of ideas. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1005-06 (1990). To shift back and forth between these two baselines is a sure recipe for inconsistency, arbitrariness, and incoherence.

None of the *amici* provide any principled reason, grounded in the purposes of the Establishment Clause, for shifting baselines according to the form of aid. One group of *amici* distinguishes between "equal access" and "equal advancement." Baptist Joint Comm. Br. 18. This is purely semantical. Tax benefits and free facilities "advance" the group's objectives, no less effectively than cash. Why is property tax exemption "access" instead of "advancement"? Other briefs rely on nebulous formalisms, labelling various forms of aid "passive," "affirmative," "indirect," "incidental," or the like. Americans United Br. 20-21; ACLU Br. 22-23. These all seem to be variations on the theme that form should dominate over substance.[9]

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[9] The emptiness of these categories is dramatically illustrated by the historical positions of these *amici*, who—making arguments not much different from those they make in this case—in past cases have argued that religious individuals and groups should be excluded from the very forms of aid that they now claim are subject to a constitutional rule of equal access. For example, *amicus* ACLU opposed the constitutionality of neutral property tax exemptions in *Walz; amici* American Jewish Congress and Anti-Defamation League opposed equal access to university facilities in *Widmar; amici* National School Boards Ass'n, Council on Religious Freedom, and ACLU opposed neutral provision of sign language interpreters in *Zobrest*; and *amici* Americans United, ACLU, and Anti-Defamation League opposed equal tuition for vocational education in *Witters*. The lines they draw with such confidence today were different yesterday and may be different tomorrow. The only consistency is that religious speakers and groups end up with less than the full and equal rights accorded to their secular fellow citizens.

Amici do not define these terms, or explain how they differentiate this case from others. For example, the University's *amici* are united in the view that the SAF program is "direct" aid, while the program in *Witters* was "indirect." *E.g.*, ACLU Br. 21-22; Council on Religious Freedom Br. 10. But in both cases, money was provided to eligible persons (there blind persons, here student groups) to pay for specified expenditures (there tuition, here printing costs) for legitimate state purposes (there vocational education, here student newspapers) without regard to the religious, philosophical, or ideological orientation chosen by the recipients. In neither case is the government responsible for the decision to adopt a religious perspective: that decision was left to the individual recipients (in *Witters*) and the editors of the various funded journals (here). In both cases, aid is "indirect" or "incidental" in the sense that any benefit to religion occurs not through the direct decisions of government but through the independent choices of private persons. The University is "directly" aiding student journalism, and only "indirectly" aiding religion.[10]

The problem goes beyond mere analytical confusion. The empty formalism of *amici*'s line between money and services or facilities would have the practical consequence of enabling recalcitrant institutions to frustrate students' constitutional rights by manipulating the forms of aid. For example, a university could charge all groups a fee for use of empty classrooms, while appropriating money from the resulting fund to reimburse qualified student organizations for this cost. Under *amici*'s reasoning, religious student groups would be ineligible for the reimbursement, since it would be in the form of a "cash subsidy." In structuring its student benefits in this fashion, the university could effectively negate the students' equal access rights under *Widmar*. Although we do not suspect these

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[10] Aid in both cases is also "indirect" in a more formalistic sense: in neither case was money transferred directly from the government to a religious institution. In *Witters*, it was given to the student, and here it is paid directly to the printer.

respondents of bad faith, we note that precisely the same results have been achieved in this case. If the University provided in-house printing facilities for student publications *Wide Awake* would be entitled to equal access; but because this benefit takes the form of a "cash subsidy" for the purchase of printing services from an outside printer, petitioners are excluded. Constitutional rights should not turn on such distinctions.

3. Finally, respondents' *amici* warn that inclusion in government benefits could subvert the autonomy of religious organizations: "What government funds, government may control." Baptist Joint Comm. Br. 8. Again, petitioners entirely share the concern that the government's power of the purse not be allowed to undermine the independence of religious activity or to distort religious practice. But again, we part company on the question of how best to achieve the agreed-upon goal.[11] Respondents' *amici* commit the logical fallacy of focusing solely on the potential danger to religious autonomy from one course of action (inclusion in a neutral subsidy) without comparing it to the severe and demonstrable danger to religious autonomy presented by the alternative.

Under the Guidelines, a religiously oriented student group can obtain necessary funding for its activities only by changing its religious practices. Black Voices, the gospel music group, was told to stop "praying at practices and encouraging members to be more of a model of faith" if it wanted to continue to be eligible for funding (J.A. 73). To its credit, the group declined, and forfeited the money. According to the University's brief (at 10), *Al-Salam*, the publication of the Muslim Students Association, was warned that the religious content of its first issue might endanger its funding, and in response "the students published a second and very different issue" of the magazine. Resp. Br. 10. The second issue was exorcised of its references to the Koran, Islamic theology, and

[11] Moreover, if the payment of *Wide Awake's* printing costs threatens to subvert its autonomy, the only parties with standing to raise that claim are the petitioners.

spirituality; these were replaced by Middle Eastern recipes and discussions of world events from a secular perspective. The publication became more secular and less distinctive: the students of the University of Virginia were deprived of what had been, in the first issue, an introduction to the rich connections between Islamic religion and culture. We assume *Wide Awake* could get funding if it removed the cross from its logo, excised all Biblical references, secularized its rhetoric, and became more like every other magazine on campus. But it is difficult to see how self-censorship of this sort advances the independence of the religious sector or the pluralism and diversity of American life.

Self-censorship and reduction in diversity are the predictable consequences of the *Lemon-Hunt* approach to the Establishment Clause, which respondents' *amici* defend. Under this doctrine, a group can receive its share of public benefits only if it is not "pervasively sectarian" and if its activities are not "specifically religious." This creates a strong financial incentive for religiously oriented organizations to secularize themselves and to soften their religious witness. Thus (to use one of the examples invoked by the Baptist Joint Committee), an otherwise eligible child care facility must refrain from "any sectarian purpose or activity" if it wishes to receive federal funds. Child Care and Development Block Grant Act, 42 U.S.C. § 9858k(a). This means that it must eliminate prayers before snack, and the reading of Bible stories. Can it seriously be contended that this *protects* the independence and autonomy of religiously affiliated child care providers or the families they serve?

Jefferson noted that when the government targets aid to religion, it "tends also to corrupt the principles of that very religion it is meant to encourage, by bribing * * * those who will externally profess and conform to it." Bill for Establishing Religious Freedom, quoted at Baptist Joint Comm. Br. 6. To exclude religion from otherwise available benefits has precisely the same effect, in reverse: it "corrupt[s] the principles" of potential re-

cipients by "bribing" those who will "externally conform" to the requirement of secularism. The constitutional rule for which the *amici* argue creates an obvious incentive for religiously oriented speakers and groups to relinquish, disguise, or downplay their distinctive religious character. It is hard to square this result with *amici*'s professed concern "to protect religion from the harm that occurs when the gears of church and state are allowed to mesh." Baptist Joint Comm. Br. 5. If we want to avoid creating incentives for individuals and groups to bend their principles in response to government funding programs (whether in a religious or a secular direction), the best course is to insist that government benefits be extended on the basis of neutral, objective criteria, *without regard to the philosophical, ideological, or religious character of their speech.*

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the Court of Appeals should be reversed, and the case should be remanded with instructions to the courts below to grant petitioners' motion for summary judgment.

Respectfully submitted,

MICHAEL W. MCCONNELL *
ALAN E. UNTEREINER
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 702-3306

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400, ext. 102
Counsel for Petitioners

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents,

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Keith A. Fournier
1000 Regent University Dr.
Virginia Beach, VA 23464
(804) 579-2489

Jay Alan Sekulow
(Counsel of Record)
James Matthew Henderson, Sr.
Kevin Eric Broyles
1000 Thos. Jefferson St. NW
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for the American Center for Law & Justice

QUESTION PRESENTED

Whether *Lemon v. Kurtzman* and its progeny, which foster discrimination against Religion and religious adherents, contrary to the principle of equality embodied in the Religion Clauses, should be overruled?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-329

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA, *et al.*,

Respondents,

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS *

The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal organization. The purpose of ACLJ is to preserve, protect and promote religious liberty through education, legal defense, legislative assistance, and related activities. ACLJ attorneys specialize in advocacy of rights to freedom of speech, freedom of conscience, and religious

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* The parties in this case have consented, by a joint letter of consent filed with the Clerk of Court, to the filing of this brief.

liberty. ACLJ's Chief Counsel has argued cases before this Court dealing with issues related to this case, including arguments on behalf of the church in *Lamb's Chapel v. School District*, 113 S.Ct. 2141 (1993), the students in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and the evangelists in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

ACLJ files this brief in support of Petitioner because the state of the law respecting the Religion Clauses of the Constitution requires significant clarification. ACLJ supports the position that private individuals and groups of individuals may not be discriminated against on the basis of their religion, religious adherence, or religious speech in the provision of any general government benefit for which they are otherwise eligible. ACLJ urges the Court to reverse the decisions below.

SUMMARY OF ARGUMENT

Never has this Court enshrined the analysis presented in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a rigid test in resolving Establishment Clause claims. This Court has repeatedly sought to guard against religious classifications which place religious individuals at an advantage or disadvantage because of their religion. Unfortunately, despite this Court's approach, lower federal courts have made the *Lemon* test the sole means for winnowing out governmental Establishments. One untoward result of rigid applications of the vaguely understandable and easily manipulable *Lemon* test is the absurd results which often are obtained thereby.

If the *Lemon* test has proven unworkable and unfaithful to the purposes of the Religion Clauses, the Court should forthrightly recognize this development. Another test exists, a test which this Court has employed previously, which is more consistent with the original purposes of the Religion Clauses. Other than *Lemon* and its misguided and confusing progeny, this Court's precedents have consistently adhered to a view that equality of voluntary religious choices, whether of nonreligion or a diversity of religious beliefs, is the better and intended understanding of the First Amendment's Religion Clauses. Among the partial applications of this test is the faithful and sensible application of the "effects" prong of *Lemon* as recognized by this Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993).

In the case at bar, Respondents suggest that the Establishment Clause justifies denial of a generally available benefit to religious groups and individuals because of their religious activity. This distorted view of "neutrality" is a direct result of the aberration *Lemon* has become on this Court's Establishment Clause jurisprudence. This Court now has the opportunity to restore the principle of equality to the Religion Clauses.

I. THE HAPHAZARD AND UNPRINCIPLED USE OF *LEMON*, EXCUSING GOVERNMENT ANIMOSITY TOWARDS RELIGION AND DISCRIMINATION AGAINST RELIGIOUS CITIZENS, MUST END

A. In This Court, Inconsistent Reliance on the

Lemon Test Has Created a Confused First Amendment Jurisprudence, While in Lower Courts, Faithful Application of _Lemon_ has Created a Marketplace Hostile to Religion

"Rather than mechanically invalidating all government conduct . . . that confer[s] benefits or give[s] special recognition to religion--as an absolutist approach would dictate--the Court has scrutinized challenged . . . official conduct to determine whether, *in reality*, it established a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (emphasis added).

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has grappled frequently with governmental activity within the sphere of the religious. In recent years, the test most consistently utilized to judge alleged violations of the Establishment Clause has been the so-called *Lemon* test, set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This Court, however, has applied the *Lemon* test only haphazardly; in a growing number of cases, the Court resolved Establishment Clause claims without any substantive discussion of the *Lemon* test or any apparent application of the test in the decision.[1] Five current Justices have expressed their discomfort with one aspect or another of the *Lemon* test. *See Grumet*, 114 S.Ct. at 2498-2500 (O'Connor, J., concurring in part and concurring in

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1 *See e.g., Board of Education v. Grumet*, 114 S.Ct. 2481 (1994); *see also Zobrest v. Catalina Foothills School District*, 125 L.Ed. 2d 1 (1993); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982) (*Lemon* not useful in analyzing instances of patent discrimination against a church).

the judgment); *Lamb's Chapel*, 113 S.Ct. at 2149-50 (Scalia, J., together with Thomas, J., concurring in the judgment); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., together with Rehnquist, C.J., White J., and Scalia, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985) (Rehnquist, J., dissenting).

Members of this Court have warned of the dangers inherent in a jurisprudence without sound historical and traditional grounding, resting too gingerly on catchy phrases and neat tests. Justice Reed, in *McCollum v. Board of Education*, 333 U.S. 203 (1948), noted that a "rule of law should not be drawn from a figure of speech." *Id.* at 247 (Reed, J., dissenting). Chief Justice Burger, a year prior to penning the *Lemon* test explained that

> [t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz v. Tax Commission, 397 U.S. 664, 668 (1970). Even while introducing the test, the Chief Justice warned that the Court should not "engage in a legalistic minuet in which precise rules and forms must govern." *Lemon*, 403 U.S. at 614.

Despite these protestations, courts bound to respect this Court and to comply with its precedents have fallen victim to the melodic soothing of *Lemon*'s simplicity, hypnotically adopting

and enthusiastically applying the *Lemon* test as the sole and controlling criterion for Establishment Clause jurisprudence. In the case before the Court, the fourth circuit's decision is representative of the inconsistency and utter disarray application of *Lemon* produces in lower courts.

The fourth circuit minimized the university's provision of in-kind support and "sustenance of religion in [several] incidental respects [which did] not . . . inhibit religion," *Rosenberger v. The Rector and Visitors of the University of Virginia*, 18 F.3d 269, 285 (4th Cir. 1994) (Pet. App. 34a), but then held that use of "public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation." *Id.* (Pet. App. 35a). Rejecting the argument that religion is inhibited, the court relied on the university's other extensive support, but failed to explain why that was not also a "patent" violation of the same clause.

While internal inconsistency of the decision below is unsurprising, if not entirely expected, the fourth circuit took *Lemon* where few enterprising courts have gone before. The court held that the university had "penalize[d] exercise of constitutional rights by withholding from [the religious students] an otherwise discretionary benefit." *Id.* at 281 (Pet. App. 25a). This "creates an *uneven playing field* on which the advantage is tilted towards . . . wholly secular modes of expression." *Id.* (Pet. App. 26a) (emphasis added). After finding such discrimination unconstitutional under the Free Speech Clause, the court then used *Lemon* to nullify its own conclusion. Miraculously, the "uneven playing field" decried

in part one, was transformed into "neutrality" under *Lemon* in part two. *Id.* at 284-85 (Pet. App. 37a). Under the fourth circuit's analysis, *Lemon* is read to consume not only the Establishment Clause, but the entire First Amendment.[2]

The results in lower courts reflect the breadth of cloudy confusion that plagues those courts which reflexively apply the *Lemon* test in every sort of Establishment Clause case. Although some of the decisions seem amusing, they all bear the scent of that "relentless extirpation of all contact between government and religion," which does not accurately or adequately reflect "the history or the purpose of the Establishment Clause." *Allegheny County*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part).

As Judge Easterbrook noted recently, "*Lemon* has lost its tang [.]" *Harris v. City of Zion*, 927 F.2d 1401, 1419, 1424 (7th Cir. 1991) (Easterbrook, J., dissenting). Whether through inherent defect, mechanistic overuse, or a wringing approach that guarantees caustically antireligious results, the mere selection of the *Lemon* test is now a signal of a court's intention to overturn challenged government practices and policies. This case presents this Court with the prospect, not merely of adjusting the error of the lower courts in the instant case, but to

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2 The fourth circuit completes its slight of hand with the dictum that the Free Exercise Clause would also support the conclusions reached under its Free Speech analysis. *Id.* at 283 n.31 (Pet. App. 30a-31a n.31). Sadly, the Equal Protection Clause appears to be *Lemon*'s next victim. *See id.* at 287-88 (Pet. App. 57a-58a). One can only guess what other liberties *Lemon*, in the hands of inferior courts, will jeopardize for religious citizens.

check and clarify the general confusion of the judiciary which attends the litigation of Establishment Clause claims.

B. Because *Lemon* Has Proven Unworkable, That Test, With Its Muddled Progeny, Should Now be Overruled Or Clarified

The Religion Clauses preclude the government from discriminating against citizens because of their religion. In *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court discussed the impermissibility of governmental hostility toward religion:

> To hold that [government] may not [accommodate religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 314. *See also Lynch*, 465 U.S. at 673.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan wrote that the provision there, which barred clergy from serving as state legislators, violated the Establishment Clause because it manifested "patent hostility toward, not neutrality respecting, religion . . . and, in sum, has a primary effect which inhibits religion." *id.* at 636 (Brennan, J., together with Marshall, J., concurring in the judgment).

The religious heritage of the American people also dictates

that government not be hostile to religion. In *Zorach*, this Court noted:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.

343 U.S. at 313-314. *See also Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970) (few concepts are "more deeply embodied in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally . . .").

Hostility toward religion robs American democratic institutions of a major source of the values which inform them. The American political tradition presupposes a government which does not seek to shape its people's values, but rather is itself shaped by them. Thus, religion has traditionally played a central role in the development of public virtue.

> Neither government nor this Court can or should ignore the significance of the fact that . . . many of our legal, political and personal values derive historically from religious teachings.

Abington School District v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., together with Harlan, J., concurring).

Despite its opinions eschewing any appearance of hostility to religion, this Court's First Amendment jurisprudence readily lends itself to the fomenting of such hostility. *Lemon*'s shallow roots in our history of religious freedom, and the ease with which its prongs may be used to bump religious expression and liberty into a second-class status in the marketplace of ideas, have brought about the very confusion and hostility sought to be avoided.

1. The *Lemon* Test Produces Confusion, Not Neutrality

a. The Secular Purpose Prong

Lemon's first prong requires a secular purpose for all government action. *Lemon* at 612-13. This Court treats the secular purpose prerequisite as meaning *any* secular purpose. *See e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion"). Although this Court has only used the purpose prong to defeat government action three times since *Lemon*, in *Edwards v. Aguillard*, 482 U.S. 578, 585-89 (1987), *Jaffree* at 56, and *Stone v. Graham*, 449 U.S. 39, 40-41 (1980), it poses a significant threat of confusing lower courts and abusing religious liberty.

Even when religious exemptions are provided on a nondiscriminatory basis, the purpose of the legislature is to remove burdens on religious freedom; thus, the government's action "advances" the cause of religion. The secular purpose prong induces tension between the Religion Clauses, failing to

take account of the fact that "intentional advancement of religion is sometimes required by the Free Exercise Clause." *Edwards* at 627 (Scalia, J., together with Rehnquist, C.J., dissenting) (citations omitted); *see also Grumet*, 114 S.Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment) (attributing the unconstitutional attempt at accommodation to prior Supreme Court rulings). As Justice O'Connor explained, "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Jaffree* at 83 (O'Connor, J., concurring).

This case demonstrates the extent to which the purpose prong may be manipulated. The fourth circuit deferred to the university's conclusion that the funding of religious activities would not further its "educational mission," 18 F.3d at 284 (Pet. App. 33a), despite the fact that religious discussion and education is part of the university's academic curriculum. *Id.* Under this application of the purpose prong, the government is allowed to define religion out of the marketplace of ideas. This discriminatory subterfuge was upheld as advancing the "secular purpose" of avoiding "an establishment of religion at the institution." *Id.* Thus, the Establishment Clause is not offended because the "purpose" is to avoid offending the Establishment Clause. *Id.* at 284 (Pet. App. 33a-34a). Under the fourth circuit's interpretation of *Lemon*, the purpose prong not only directly contradicts this Court's warnings against religious hostility, it becomes circular as the maze of logic grows longer.

Not only has the purpose prong "made such a maze of the

Establishment Clause that even the most conscientious governmental officials can only guess what motives might be held unconstitutional," *Edwards*, 482 U.S. at 636 (Scalia, J., together with Rehnquist, C.J., dissenting), but "discerning the subjective motivation of those enacting the statute, is to be honest, almost always an impossible task." *Id.* *Lemon* thus fails to heed the warning "that determining the subjective intent of legislators is a perilous enterprise." *Id.* at 638.

b. The Effects Prong

The second prong of the *Lemon* test requires that "the principal or primary effect [of government action] must be one that neither advances nor inhibits religion." *Lemon* at 612. Since *Lemon*, this Court has only once struck down government action as "inhibiting" religion. *Larson v. Valente*, 456 U.S. 228 (1982). This is not surprising, as faithful application of the effects prong is impossible without absolute equality. As Justice Frankfurter explained:

> Religious beliefs pervade, and religious institutions have traditionally regulated virtually all human activity . . . . State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

McGowan v. Maryland, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., with Harlan, J., concurring in the judgment).

Clearly, every government action will, in some respect, either "advance" or "inhibit" a subject which pervades "virtually all human activity." Thus, similar to the purpose prong, the effect prong is unworkable as a model for distinguishing between those government actions which advance religion only (i.e., an establishment of religion), and those actions advancing religious freedom (i.e., an accommodation of religion).

Of more fundamental concern, prohibiting government action which has the effect of advancing religion readily permits discrimination against religion in the provision of government benefits. In the case before the Court, the university takes fourteen dollars per semester from every full-time student for student activities. 18 F.3d at 270 (Pet. App. 2a). The funds are used to support a "wide variety of student organizations, activities, and publications," *id.*, as long as they are not, *inter alia*, political or religious. *Id.* at 271 (Pet. App. 3a). Amazingly, the fourth circuit held that this discrimination does not "inhibit" religion. *Id.* at 283 (Pet. App. 34a).

In the economic marketplace, the notion that taxation without equal subsidization would not "inhibit" the nonsubsidized competitor is bad economic theory. In the marketplace of ideas, the theory is no more legitimate. As Justice Brennan has explained, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Here, the selective provision of general funds is at the heart of the university's "authoritative selection" process. The illogic of the

conclusion that this does not "inhibit" religion is astounding.[3]

This Court has clearly held that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990) (citation omitted). Yet, *Lemon*'s effect prong clearly gives lower courts license to deny Religion or religious people equality in the provision of general government benefits; this Court must then revoke this license piecemeal as it creates more confusion with each sidestep of *Lemon*. *See, e.g., Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141, 2148 (1993); *Zobrest v. School District*, 125 L.Ed. 1, 10 (1993). The language of *Lemon* lives on and its inherent confusion reigns in lower courts that torturously misapply it to the detriment of Religion and religious adherents.

c. The Entanglement Prong

The third and most tangled web of the *Lemon* test prohibits

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3 The fourth circuit's astonishing conclusion that the university would be advancing religion by treating religious groups equally, 18 F.3d at 283 (Pet. App. 35a), is further evidence of *Lemon*'s invitation to the bizarre. It is as if the university and the lower courts believe religious adherents do not need to be treated equally to compete on par with other philosophical and scientific views in the quest to prove their religious tenets and ideas are the"truth" Justice Brennan wrote about. Religious citizens must have some hidden fountain of wealth that never runs dry; but, from the public fountain, all nonreligious citizens and groups may drink and the government even draws the water. Perhaps the Commonwealth of Virginia believes in a miraculous Divinity after all.

"excessive entanglement" between government and religion. *Lemon* at 613. As noted above, preventing all entanglement of religion and government is impossible; it is, equally, unwise. As Justice Brewer explained in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), "[e]very constitution of every one of the . . . States contains language which . . . recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community . . . . [T]hey affirm and reaffirm that this is a religious nation." *Id.* at 468, 470. *See also Zorach*, 343 U.S. at 306 ("We are a religious people whose institutions presuppose a Supreme Being . . ."). Recently, recognizing this tradition, Justice Scalia wrote that "those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good . . . . Unsurprisingly then, indifference to 'religion in general' is *not* what our cases, both old and recent, demand." *Lamb's Chapel*, 113 S.Ct. at 2151 (Scalia, J., together with Thomas, J., concurring in the judgment) (emphasis in original) (citations omitted). Thus, some entanglement of the civil and religious is not only inevitable, but quite welcome.

The qualifier "excessive" does not save *Lemon*'s third prong from absurd and confusing results. Indeed, even before *Lemon*, this Court had recognized the paradox inherent in asking government to maneuver one way or the other to avoid "excessive entanglement" with religion. *See Walz*, 397 U.S. at 674 (acknowledging that elimination of tax exemptions for religious organizations would tend to expand, not contract government involvement with religion). In *Widmar v. Vincent*, 454 U.S. 263 (1982), this Court noted that to exclude all religious groups from a privilege granted to others would risk

greater entanglement as

> the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many various beliefs meet the constitutional definition of religion."

Id. at 272 n.11 (citation omitted). Entanglement, then, can mean any number of things and leaves government in the same incurable position as the other two prongs; stuck with an "insoluble paradox." *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting); *Lemon* at 668 (White, J. concurring in part and dissenting in part).

Like the effects prong, entanglement readily allows discrimination against religious citizens. In the case at bar, while the fourth circuit held that the refusal to grant a general benefit to religious organizations is justified by the entanglement prong of *Lemon*, it found no problem in granting those benefits to such "cultural organizations" as the Muslim Students Association and the Jewish Law Students Association. 18 F.3d at 287 (Pet. App. 41a). Curiouser and curiouser, the fourth circuit's entanglement analysis largely rested on the "'potential for political divisiveness related to religious belief and practice' . . . ." *Id.* at 285 (Pet. App. 37a). The court must fear that "'facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,'" *Id.* at 272 (Pet. App. 5a) (quoting Wide Awake Productions' Constitution), is somehow a call to arms. The fourth circuit failed to explain how the Jewish and Muslim students are trusted to

live in peace and harmony while treating *religious* students equally is believed to be the first step toward Holy war.[4] The fact that Ronald Rosenberger has been in litigation with the university for over four years because of discrimination against religion and religious students, not because of its funding, provides the final and most emphatic example of another *Lemon* "insoluble paradox."

2. *Lemon* and its Confusing Progeny Should Be Overruled

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4 Perhaps the court believed that Jews and Muslims have a milder history of "divisiveness." Of course, such a distinction between the "political divisiveness" of religion and the "cultural divisiveness" between Jews and Muslims is not only practical fantasy, it is historical nonsense.

The Commonwealth of Virginia has come full circle after two centuries. This Court has noted that James Madison's views "accurately reflect[] the spirit and purpose of the Religion Clauses of the First Amendment," *McDaniel*, 435 U.S. at 624. Madison's Remonstrance condemns the very discrimination the university here seeks to justify:

> [T]he bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore no less, one than another, of their natural rights . . . . As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.

Madison, A Memorial and Remonstrance Against Religious Assessments, 1785, *reprinted in Everson v. Board of Educ.*, 330 U.S. 1, 66 (1947) (App. to opinion of Rutledge, J., dissenting).

Lemon has produced results in lower courts at odds with the neutrality required by the Constitution's text and history. *Lemon*'s progeny have also sanctioned varying degrees of hostility to religion, placing religious adherents at a disadvantage with regard to other citizens.[5] This Court now has "the proper case . . . [to] bring [its] Establishment Clause jurisprudence back to . . . the proper track--government impartiality, not animosity, towards religion." *Grumet*, 114 S.Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 2505 (Kennedy, J., concurring in the judgment); *id.* at 2515 (Scalia, J., together with Rehnquist, C.J., and Thomas, J., dissenting).

II. GOVERNMENT MAY NOT USE RELIGION OR RELIGIOUS ADHERENCE AS A BASIS OF CLASSIFICATION EXCEPT TO AVOID INFRINGEMENT OF RELIGIOUS FREEDOM

In *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan presented an interpretation of the Religion Clauses, gleaned from this Court's precedents, which is faithful to the historical understanding and proper harmony of the First Amendment:

> Beyond the[] limited situations in which government

5 *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

> may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.

Id. at 639 (Brennan, J., concurring) (footnote omitted). This principle of equality of religious exercise should replace *Lemon* as guiding "[t]he general nature of [the Court's] inquiry in this area . . . ." *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

A. The Founders Understood the Religion Clauses to Compliment Each Other, Ensuring that Religion or Religious Adherence is Pertinent Only to Accommodation of Religious Freedom

A proper understanding of the First Amendment views it as a political compromise among several colonies worried about the power of a centralized government encroaching on local beliefs.[6] This fear of centralization forced a compromise among various founding colonial views. As this Court correctly noted in *Everson*, "[n]o one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty." 330 U.S.

6 *See* CORD, SEPARATION OF CHURCH AND STATE 14-15 (1982); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 3, 22, 172 (1965); *see generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

at 11. The views of Virginia's leaders should be relevant only as they respect this equality. Madison believed that

> equality [] ought to be the basis of every law . . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience."

Memorial and Remonstrance, *reprinted in Everson*, 330 U.S. at 66 (App. to opinion of Rutledge, J., dissenting) (emphasis in original) (footnotes omitted). Madison's ideal government was

> best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property, by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

Id. at 68. He took these views of equality with him when he led the debate over the Bill of Rights.[7]

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7 As then Associate Justice Rehnquist noted in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Madison's first proposal for the Religion Clauses read:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and *equal rights of conscience* be in any manner, or on any pretext, infringed.

Thus, the Founders understood the Religion Clauses to be mutually supportive, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), prohibiting certain government action which would infringe the equally protected liberty to make one's own decisions regarding Religion.[8]

Even if incorporation is viewed as removing the specific federalism limitation on the amendment, it should not change the content of its substantive limitations. This Court should look to the understanding of the relationship between the Religion Clauses as understood by the Founders to clarify its jurisprudence in this area. A study of opinions other than *Lemon* and its aberrant progeny, demonstrates that this Court has frequently done just that.

B. This Court's Decisions Judging Religious Classifications, Other than *Lemon* and its Inconsistent Progeny, Employ Equality of Freedom of Belief and Opinion as the Governing Principle

1. This Court Used the Equal Protection Clause to Govern the Analysis of Religious Classifications in its Equal Access Cases

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Id. at 94 (Rehnquist, J., dissenting) (citation omitted) (emphasis added); *see generally id.* at 92-100.

8 *See* TRIBE, AMERICAN CONSTITUTIONAL LAW §14-2, 1156-57 (2d. ed. 1988).

This Court has clearly held that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . ." *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) (citations omitted). This equal protection analysis applies with equal force to religious speech. In *Widmar v. Vincent*, 454 U.S. 263 (1982), this Court held that granting student religious groups equal access to university facilities would not violate the Establishment Clause. *Id.* at 270-76. Accordingly , this Court found "novel" the argument that religious worship, as opposed to speech about religion, is not subject to the same equal protection guaranteed by the First and Fourteenth Amendments. *Id.* at 269 n.6. Indeed, this Court has consistently upheld protection for religious speech in a wide variety of contexts, with no suggestion that the religious content of that speech in any way limits the full force of First Amendment guarantees.[9]

While finding that equal protection must be afforded religious

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9 *See, e.g., ISKCON v. Lee*, 112 S. Ct. 2701 (1992) (upholding ban on solicitation at airport terminals); *Lee v. ISKCON*, 112 S. Ct. 2709 (1992) (per curiam) (distribution of religious literature in airport terminals); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (distribution of religious literature in airport terminals); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (upholding limitation on solicitation at state fairgrounds); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (distribution of religious literature in company town); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (street preaching); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (distribution of religious literature in public places).

speech, this Court has consistently hidden *Lemon*'s paradoxical logic under a bushel of common sense. The focus has changed from looking for effects that "advance" religion, looking instead to whether the effect of the challenged government action is to foster religious uniformity or otherwise interfere with voluntary choices on matters of religion. Thus, in *Widmar*, the issue under the "effects" test was not "whether the creation of a religious forum would violate the Establishment Clause," but rather whether a "University [which] ha[d] opened its facilities for use by student groups . . . [could] exclude groups because of the content of their speech." *Widmar* at 273. The Court was then "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." *Id.* In *Board of Education v. Mergens*, 496 U.S. 226 (1990), this Court held that equal access by high school students to school facilities for *religious purposes* was fully compatible with the Establishment Clause. Justice O'Connor emphasized that when the government treats religious groups equally

> the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Id. at 248. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in government facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993), was the third-time charm of equality for religious

access. There, this Court held that denying access to even non-public forums solely on the basis of the religious perspective of speech was unconstitutional viewpoint-based discrimination. *Id.* at 2147. Leaping over *Lemon* in a single bound, the Court had "no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel* at 2148. At a minimum, these cases clearly hold that the First Amendment precludes any governmental effort to single out and censor--or otherwise burden--the speech of private parties *solely because that speech is religious*.

2. As This Court has Retreated From *Lemon* in Cases Directly Challenging State Action Under the Establishment Clause, Various Opinions Have Recognized Equality as the Governing Principle of the Religion Clauses

This Court's precedents, which place Religion and religious adherents on an equal level for First Amendment purposes, are not confined to the Speech Clause. Beginning with *McDaniel*, this Court began to sidestep *Lemon's* constraints when addressing religious liberty issues. In finding that Tennessee could not condition the service in its state legislature on the surrender of the right to exercise religious activity, the plurality saw the state as "punishing a religious profession with the privation of a civil right." *McDaniel,* 435 U.S. at 626 (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). Justice Brennan explained, "[r]eligionists no less than members of any

other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 640-641 (Brennan, J., concurring) (footnote omitted). Wishing to be more explicit about the equality basis for the Court's decision, Justice White suggested that the state law should be found "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 643 (White, J., concurring in the judgment).

As this Court has turned to an equality reasoning under the Religion Clauses, the focus has been on the "benefit" of an enactment as it relates to comparable benefits made generally available. *Larson v. Valente*, 456 U.S. 228 (1982), provided the starting point for bridging the gap of equality from the Speech Clause to the Establishment Clause. Citing *Widmar*, this Court subjected a statute to strict scrutiny because it imposed greater administrative burdens on religious groups soliciting more than fifty percent of their funds from nonmembers than other religious groups. *Larson* at 247. Finding the statute a violation of the Establishment Clause, Justice Brennan explained:

> Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision--freedom for all religion being guaranteed by free competition between religions--naturally assumed that every denomination would be equally at liberty to exercise

and propagate its beliefs.

Id. at 245 (footnote omitted). In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court completed this half of the bridge from *Widmar*, recognizing equality between Religion and nonreligion. *Mueller* involved a state statute providing tax deductions for school expenses for parents of children attending public and private schools. Consistent with *Widmar* and *Larson*, this Court, in finding the statute did not violate the Establishment Clause, noted that "'[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.'" *Mueller* at 397 (citation omitted). *See also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988); *Witters v. Wash. Dept. of Ser. for Blind*, 474 U.S. 481, 487 (1986). Chief Justice Rehnquist summarized this neutrality concept in *Zobrest v. School District*, 125 L.Ed. 1 (1993):

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id. at 10 (citing *Bowen*, *Widmar*, *Mueller*, and *Witters*) (citations omitted).

In this Court's latest Establishment Clause case, every Justice agreed with this principle of equality. *See Board of Education v. Grumet*, 114 S.Ct. 2481, 2487 (1994) (plurality opinion of Souter, J., together with Blackmun, Stevens, and Ginsburg, JJ.);

at 2497 (O'Connor, J., concurring in part and concurring in the judgment); at 2504 (Kennedy, J., concurring in the judgment); at 2508 (Scalia, J., together with Rehnquist, C.J., and Thomas, J., dissenting). As Justice Kennedy explained:

> [T]he Establishment clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.

Id. at 2504 (Kennedy, J., concurring in the judgment).

Here, the university seeks to justify religious segregation by drawing a fine distinction between provision of equal access and equal provision of general subsidies. Yet, this strange notion of "neutrality" is out of step with this Court's path back toward equality after *Lemon*.[10] The logical next step for religious equality is to extend the equal protection to all forms of generally available government assistance, so as to completely bridge the gap between the Establishment Clause and the rest of the First Amendment. This does not require a

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10 The university hopes to save its strained logic by relying on *Lemon* and a long list of its aberrant offspring. Respondent's Brief in Opposition at 19. At base, the university's long list of citations supporting its understanding of "neutrality" is simply a convenient compilation of this Court's departures from the equality principle which steadily began after 1971. We have our own list *supra* note 5.

novel construction project; *Lemon* has, in fact, smoldered, slowly spreading to consume planks of equality that this Court had laid throughout its dealings with the Religion Clauses.

3. First Amendment Decisions Preceding *Lemon* Recognized Equality as the Governing Principle of the Religion Clause.

This Court consistently adhered to the equality principle for Religion and religious adherents, prior to *Lemon*. In 1899, this Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a building on the hospital grounds. *Bradfield v. Roberts*, 175 U.S. 291 (1899). Without proof the hospital discriminated on the basis of religion or otherwise operated inconsistent with the aid, its religious affiliation was found "wholly immaterial." *Id.* at 298. A commitment to equality continued in this Court's opinions addressing the Establishment Clause. In *Everson*, Justice Douglas wrote that government

> cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation . . . . [w]e must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without

> religious belief.

330 U.S. at 16 (emphasis in original).

In referring to the First Amendment's required religious voluntarism, which protects the freedom to choose a religion or none at all, Justice Harlan has explained that

> [*n*]*eutrality in its application requires an equal protection mode of analysis*. The Court must survey meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders.

Walz, 397 U.S. at 696 (Harlan, J., concurring) (emphasis added); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (First Amendment "mandates government neutrality between religion and religion, and between religion and nonreligion"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted) (government cannot "pass laws or impose requirements which aid all religions as against non-believers, and [] can[not] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"). As these opinions demonstrate, long before *Lemon* soured this Court's Religion Clause jurisprudence, equality was the guiding principle.

Viewing the First Amendment through the lens of equality returns the Religion Clauses back to what they were originally meant to be, two sides of the same coin used to purchase liberty of religious voluntarism. This is the view of religious liberty

envisioned by the Framers, respected by this Court's Religion Clause cases before *Lemon*, and nurtured in various Speech, Establishment, and Free Exercise cases since *McDaniel*.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the lower courts in this case, adopting the "equality" (or "neutrality") analysis employed consistently before *Lemon* and sporadically thereafter.

Respectfully submitted,

Keith A. Fournier
1000 Regent University Dr.
Virginia Beach, VA 23464
(804) 579-2489

Jay Alan Sekulow
(Counsel of Record)
James Matthew Henderson, Sr.
Kevin Eric Broyles
1000 Thos. Jefferson St. NW
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for the American Center for Law & Justice

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF PETITIONERS

EDWARD M. GAFFNEY, JR.
Valparaiso University
Law School
656 Greenwich Street
Valparaiso, IN 46383
(219) 465-7833

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 94-329

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INTEREST OF *AMICUS CURIAE*

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics – lay and clergy alike – to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of

all Americans and is thus prepared to defend those rights in court.

ARGUMENT

Under the Fourth Circuit's reading of the Establishment Clause, a public university allocating funds for expressive activities must discriminate against religious students, even though such discrimination "violates the Speech and Press Clause" and is therefore "presumptively unconstitutional." Pet. App. 34a, 39a. All other students participate equally in campus life, regardless of viewpoint. Religious students, however, must censor their speech if they wish to satisfy university funding guidelines. Pet. App. 24a-26a.

The Fourth Circuit held that because *Wide Awake* publishes religious views, it is not entitled to the same speech and press freedoms as other publications. This analysis rests on two inaccurate premises. First, the court overlooks constitutional history when it reads the First Amendment to afford less protection to religious publications than to other members of the press. In Parts I and II of our brief, we show that the protection of religious speech was a central concern motivating both the First and Fourteenth Amendments.

Second, the Fourth Circuit wrongly assumes that religious expression is somehow distinct and severable from the political, philosophical and social discussion that occurs on public university campuses. On the contrary, religious speech often addresses issues debated in an academic setting, though from a distinctive perspective –

one the Framers viewed as very important. In Part III, we show that the Fourth Circuit's attempt to artificially isolate religious speech from campus debate will impoverish discourse in public universities.

I. Publication of Religious Viewpoints Deserves the Highest Level of First Amendment Protection

A. Suppression of Religious Speech Was a Primary Defect of an Established Church

Early English emigrants to America included many religious refugees seeking to escape the influence of an established church. William Laud, Archbishop of Canterbury under Charles I, suppressed criticism of the Church of England and its hierarchy. One example gives a flavor of the times:

> In 1628, at [Laud's] instigation, a Puritan minister, Alexander Leighton, was indicted before the Star Chamber as the admitted author of a book that called the institution of bishops anti-Christian and satanic. He was put in irons and was kept in solitary confinement for fifteen weeks in an unheated cell "full of rats and mice, and open to snow and rain." His hair fell out, his skin peeled off. He was tied to a stake and received thirty-six stripes with a heavy cord upon his naked back; he was placed in the pillory for two hours in November's frost and snow; he was branded in the face, had his nose slit and his ears cut off, and was condemned to life imprisonment.

7 W. & A. Durant, *The Story of Civilization* 189-90 (1961). The brutal punishment of Leighton was aimed at both his

deviance from the official orthodoxy of the established church and his temerity to spread his dissenting views through unlicensed publication. The Crown enforced religious orthodoxy by establishing the Church of England, and it sought to repress all forms of dissident speech, whether political or religious, by controlling the press through the notorious licensing system.

As search warrants from this period illustrate, the full severity of the licensing system was visited upon all religious and political dissidents, including Quakers and Roman Catholics. The term "seditious libel" referred not only to "treasonable" criticism of the Crown, but also to "scandalous" publication of "blasphemous" and "superstitious matter," including religious tracts or devotional material that were not in full conformity with the "doctrine and Discipline of the Church of England." *See, e.g., Copies Taken from the Records of the Court of King's Bench, at Westminster, Of Warrants Issued by Secretaries of State, etc.* 2 (Quaker), 5 ("Popish priest"), 15, 17, 27, 48 (publication of Roman Catholic manual of devotions), 49 (publication of Missals and Breviaries), 56, 74 (1763), *reprinted in The Literary Property Debate: Seven Tracts, 1747-1773* (P. Webb ed., 1974); *see also The Craftsman's Doctrine and Practice of the Liberty of the Press* 12, 20, 56-57 (1732), *reprinted in The Craftsman: Four Tracts 1731-1740* (1974). "Whether Catholics or Protestants, or Anglicans or Puritans, controlled the government, the compulsion of conscience for the sake of uniformity necessitated restraints on freedom of speech and press regarding religion." L. Levy, *Emergence of a Free Press* 5 (1985) (*"Emergence"*).

Persecution for religious speech was not as prevalent in America as in England. Nevertheless, there were still a

number of attempts to suppress the speech of religious dissenters in the Congregationalist colonies of New England and the Anglican colonies of the South. For example, the first president of Harvard University, Henry Dunster, was convicted of breaching the peace and forced to resign after delivering sermons critical of infant baptism. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 34-35 (1906); *Emergence*, at 26.

Quaker immigrants suffered particular persecution. Quakers were notorious for confronting ministers and other acts of defiance, such as walking about naked to symbolize the spiritual nakedness of the people. A 1656 statute adopted in five Puritan settlements denounced Quakers as "heretickes" who "speak and write blasphemous opinions" about the government and the church. The statute penalized Quakers arriving in the colonies, as well as the master of any ship bringing them. Four Quakers were executed in Massachusetts when they defied decrees of banishment and returned to the colony. Others "of both sexes were stripped and flogged from town to town." Rhode Island declined to join in deportation of Quakers, reasoning that they "delight to be persecuted by civil powers" and where they are "suffered to declare themselves freely, and are only opposed by arguments in discourse, there they least of all desire to come." L. Levy, *Blasphemy* 255-59 (1993).

Baptists were also targeted. John Clarke and Obadiah Holmes were punished and banished from Massachusetts in 1651 for preaching against infant baptism. *Blasphemy*, at 254. According to one estimate, about fifty Baptists suffered imprisonment in Virginia for crimes such as

preaching in unlicensed houses, preaching without Episcopal ordination, holding religious meetings "in other manner than according to the Liturgy and Practice of the Church of England" and preaching the gospel contrary to the Book of Common Prayer. L. Levy, *The Establishment Clause: Religion and the First Amendment* 3 (1986).

Attempts to suppress religious speech flared up during the pre-Revolution religious revival known as the Great Awakening. As the revival spread through the colonies, evangelical Christians challenged the established churches, encouraging colonists to rely on religious experience, rather than simply accepting the teachings of the established clergy. T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 96-99 (1986). As a result of evangelical challenges, many of the colonies attempted to legally suppress the new movement, which was perceived as overly emotional. In 1741, the attorney general of South Carolina initiated a prosecution for criminal libel against the most successful evangelist of the period, George Whitefield, for an article criticizing the established church of Charleston. Whitefield was released on bail and no indictment was issued. *Emergence*, at 59. Virginia banned itinerant preaching by Presbyterian evangelicals in the 1740's. Curry, at 99. Connecticut banned itinerant preaching in 1742. *Id.* at 96-97.

Attempts by established churches to suppress dissenting religious speech were still occurring on the eve of the Revolution. In a 1774 letter, James Madison complained of the jailing of Baptist preachers in Virginia:

> This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close

> [Gaol] for publishing their religious Sentiments which in the main are very orthodox.

5 *The Founders' Constitution* 60 (P. Kurland & R. Lerner eds., 1987).

B. The Desire to Protect Religious Speech Motivated Advocates of Press Freedom and Disestablishment

This history of suppressing religious speech provoked increasing pressure for freedom of the press, complemented by calls for an end to church establishments. These two movements coalesced in the drive for passage of the Virginia Act for Establishing Religious Freedom, shortly prior to adoption of the First Amendment.

1. English Advocates of a Free Press

The English Civil War displaced Laud and the Anglicans, and brought to power a Parliament dominated by Puritans and Presbyterians. The shift in the balance of power did not end the punishment of dissenting religious speech, however, merely changing for a time the definition of a dissenter. Nevertheless, the decade of the 1640's witnessed growing agitation for a wider freedom to publish religious views at odds with the prevailing orthodoxy. The most prominent advocate of a free press was John Milton, the Puritan pamphleteer who became Latin secretary to Oliver Cromwell's Council of State and later authored *Paradise Lost* and *Paradise Regained*. After Parliament passed a measure to control printing, Milton, without a license, published his *Areopagitica: A Speech of Mr.*

John Milton for the Liberty of Unlicensed Printing, to the Parliament of England (1644), *excerpted in* 1 *Norton Anth. of English Lit.* 1399 (4th ed. 1979).

Milton was merely the most prominent among several supporters of free religious expression. In 1644, *The Compassionate Samaritane*, by "Leveller" William Walwyn, advocated greater freedom of the press and the repeal of statutes limiting religious freedom. J. Frank, *The Levellers* 37 (1955). In his 1644 *Liberty of Conscience*, Henry Robinson promoted a complete freedom of the press in religious matters, extending beyond Protestants to "Papists, Jewes, Turkes, Pagans, Hereticks, with all Infidels & Misbeleevers." He argued for religious combat to be "fought out upon eaven ground, on equal terms, neither side must expect to have greater liberty of speech, writing, Printing, or whatsoever else, then the other." *Emergence*, at 93. Similarly tolerant was a 1646 reprint of an earlier tract by Leonard Busher, a Baptist, arguing that "all sorts of Christians; yea, Jews, Turks, and pagans," should be allowed "to write, dispute, confer and reason, print and publish any matter touching religion, either for or against whomsoever." *Id.* at 101.

The opponents of state licensing of the press, including John Milton, often used theological arguments to attack this system of thought control. For instance, at the end of the 17th Century, an opponent of licensing writing under the pen name of "Philopatris" [lover of his country] noted the irony that this system of oppression

> robs us of that great Argument we make use of against the Mahometans; and what is worse, Popish religion, viz., That Ignorance is the Mother of their Devotions; since how can We

> justly brand their Religions, for being founded merely upon their Laicks Ignorance; when we in like manner discountenance Knowledge ourselves? How can we upbraid Papists for not daring to permit their Common people to read the Bible, when we do the same thing in effect, by tying all persons up to one man's Exposition and Interpretation of the same, viz., the Licenser's who will not permit any Exposition to come forth that thwarts his own particular Judgment.

A Vindication of Learning: or, An Humble Address to the High Court of Parliament in behalf of the Liberty of the Press (1679), *reprinted in Freedom of the Press: Four Tracts 1664-1693* (1975); *see also Reasons Humbly Offered for the Liberty of Unlicens'd Printing* (1693), *reprinted ibid.*

Later English advocates for freedom of religious expression exerted tremendous influence in the colonies. John Trenchard and Thomas Gordon worked in collaboration to publish *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects.* "In the history of political liberty as well as of freedom of speech and press, no eighteenth century work exerted more influence than *Cato's Letters.*" *Emergence*, at 114. One letter, published in 1721, argued:

> As long as there are such Things as Printing and Writing, there will be Libels: It is an Evil arising out of a much greater Good . . . . I must own, that I would rather many Libels should escape, than the Liberty of the Press should be infringed; yet no Man in England thinks worse of Libels than I do; especially of such as bid

> open Defiance to the present Protestant Establishment.

1 *Cato's Letters* 252-53 (photo. reprint 1971).

Also carrying great weight in colonial thinking was the position of John Locke, who argued that external government coercion could not bring about "inward persuasion of the mind," the essence of "true and saving religion." Locke denied that the magistrate's power extended "to the establishing of any articles of faith, or forms of worship, by the force of his laws," since laws require penalties and penalties "are not proper to convince the mind." J. Locke, *A Letter Concerning Toleration* (1684), *excerpted in Locke and Liberty* 107, 110-11 (M. Salvadori ed., 1960).

As the Revolution approached, an English clergyman pointed to an established church as the cause of infringements on religious expression. Reverend Philip Furneaux published *The Palladium of Conscience,* arguing that "a national establishment is in its nature opposite to the genius of Christianity" since "[t]ruth can only be supported and propagated by reason and argument." P. Furneaux, *The Palladium of Conscience* 23 (photo. reprint 1974) (1772). Two editions of Furneaux's work circulated in America before the Revolution. *Emergence,* at 164.

2. The Colonial Drive for Press Freedom and Disestablishment

Two men in particular deserve credit for importing expansive notions of religious freedom to the American

colonies. Roger Williams, a minister expelled from Massachusetts, founded Rhode Island, known thereafter as the most religiously tolerant of the colonies. Williams' most important defense of religious liberty, published in 1644, was entitled *The Bloudy Tenent of Persecution for Cause of Conscience.* Among other points, Williams sought to demonstrate that:

> It is the will and command of God, that (since the comming of his Sonne the Lord Jesus) a permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, bee granted to all men in all Nations and Countries: and they are onely to bee fought against with that Sword which is only (in Soule matters) able to conquer, to wit, the Sword of Gods Spirit, the Word of God.

3 *The Complete Writings of Roger Williams* 3 (1963). "Williams addressed *The Bloudy Tenent* to Parliament, which repaid the unsolicited compliment by ordering the common hangman to burn the book." C. Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 193 (1953).

Another importer of religious liberty to the colonies was William Penn, a Quaker and the son of an English admiral. Following restoration of the monarchy, Penn was imprisoned in the Tower of London on order of the Privy Council pending an investigation of one of his books for "blasphemy" (really heresy). After eight-and-a-half months in prison, Penn won his release by publishing a new work clarifying his views on the Trinity and the divinity of Christ. *Blasphemy,* at 216-18. In 1671, while in prison again for preaching, Penn wrote *The Great Case of*

Liberty of Conscience. Penn later founded the colony of Pennsylvania, which became a haven for Quakers. 8 W. & A. Durant, *The Story of Civilization* 255-56 (1963).

The increasingly popular notion of "freedom of the press" in the colonies included the freedom to publish one's opinions on matters of both government and religion. A 1734 article in the *American Weekly Mercury* defined "Freedom of the Press" to include liberty "for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government." L. Levy, *Freedom of the Press from Zenger to Jefferson* 41 (1966). James Alexander, an attorney who participated in the defense of printer John Peter Zenger, wrote an essay arguing that "the Liberty of the Press is a liberty for every man to communicate his sentiments freely to the public, upon political or religious points." *Emergence*, at 126.

The growing respect for freedom of the press in the colonies occasionally led to jury nullification of government attempts to punish religious expression. For example, in a 1707 New York case, two Presbyterian ministers, Francis Makemie and John Hampton, were arrested for preaching without a license with intent to "spread their Pernicious Doctrine and Principles, to the disturbance of the Church by Law Established, and of the Government of this Province." The jury acquitted, quite possibly out of resistance to the notion that Anglicanism was the established religion of New York. *Emergence*, at 35-36; Curry, at 69-70.

Even voices within the established denominations joined in the call for freedom of religious expression. After Connecticut enacted its anti-evangelical law of

1742, Elisha Williams, former rector of Yale, published *The Essential Rights and Liberties of Protestants*. Williams drew upon John Locke to proclaim the natural right of the religious person to determine the direction and expression of his conscience. While not opposed to an established church, Williams pointed to dangers from certain laws protecting the established religion. *See* R. Bushman, *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765*, 227-28 (1967).

Following the Revolution, the link between freedom of the press and the campaign for disestablishment was exhibited in the Virginia struggle for passage of the Act for Establishing Religious Freedom. Rejecting a proposal for tax-supported ministers, the Virginia Assembly instead adopted the statute drafted by Jefferson. The operative language provided that:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that *all men shall be free to profess, and by argument to maintain, their opinion in matters of religion*, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

5 *Founder's Constitution*, at 85 (emphasis added).[1] Implicit in the statute was an equation between the negative right to be free from compulsion by an established church and

---

[1] Funding a broad spectrum of speakers, including religious speakers, does not compel support of every message, but rather ensures robust discourse in the marketplace of ideas.

the positive liberty to profess and argue for one's own religious views.

It was against this background that the First Amendment was drafted. Madison's original proposal for a Bill of Rights dealt with religious establishments in a different amendment from freedom of the press. It is appropriate that they were combined, however, because freedom of religious expression was a significant concern behind the Free Speech and Free Press Clauses. Likewise, the ban on an established church complemented the Free Press Clause, eliminating one of the primary reasons for government suppression of religious publications. As noted in the Williamsburg Charter, a bicentennial document signed by the Chief Justice, religious freedom "is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

Thomas Jefferson, the founder of the University of Virginia, opposed an established church in order to protect citizens' freedom "to profess, and by argument to maintain, their opinion in matters of religion." There is great irony in the fact that Jefferson's University now contends that allowing religious students to freely express their views with the same privileges as other students would violate the First Amendment. The Court should reject the Fourth Circuit's conclusion that religious speech deserves less constitutional protection in our public universities than other types of speech.

II. The Fourteenth Amendment Was Also Motivated By a Desire to Protect Religious Expression

This Court has incorporated free press protections against the states through the post-Civil War Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Professor Amar argues that "when we 'apply' the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the Amendment of 1866, not the Bill of 1789." Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1266 (1992).

Analyzing the intent of the Fourteenth Amendment Framers requires an understanding of the abolitionist movement which influenced the Republican Reconstruction Congress. A significant impetus behind the Fourteenth Amendment was a history of attempts by slave states to silence the religious speech of abolitionists.

The abolitionist movement was spearheaded by devout religious believers who proclaimed a law of higher authority than that of encoded state law. Combining theological insights with the rich American tradition of natural rights, these freedom fighters based their zeal to eradicate slavery on the premise that all human persons are created by God as equals, and that to assault human dignity through enslavement was an egregious sin. *See* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479 (1950).

Abolitionist Christians made moral appeals concerning the evils of slavery through speeches, sermons and publications. *See, e.g.*, Graham, at 486-93, 620-21. Theodore Dwight Weld, for example, converted by the preaching of attorney Charles G. Finney, turned out many pamphlets central to the movement, such as *Slavery As It Is* (1839), *The Bible Against Slavery* (1837), and *The Power of Congress over the District of Columbia* (1838). Graham, at 487, 490. The *Weekly Emancipator*, an abolitionist newspaper, was edited by minister-lawyer Joshua Levitt, and one of the most influential texts of the movement, *Letters on American Slavery* (1823), was written by the Reverend John Rankin. *Id.* at 489, 621-22. The Fourth Circuit in this case considered it significant that *Wide Awake* has a cross printed on each page. Pet. App. 8a. Each page of William Lloyd Garrison's abolitionist paper, *The Emancipator*, had a cross and a biblical quotation at the top.

Antebellum southern states attempted to suppress speech and publications critical of slavery, and passed resolutions demanding that northern states do the same. *See* M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 28-50 (1986); Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1713-17 (1991); Nelson, at 533-34. Several states criminalized abolitionist speech or banned members of abolitionist societies from their jurisdiction. *See, e.g.*, 1820 S.C. Acts 22-23; 1804 Ga. Laws 5-6; 1802 N.C. Sess. Laws 12-13. A Virginia statute, for example, provided:

> That any member of an abolition or anti-slavery society, or agent of an abolition or anti-slavery society, who shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery, shall be deemed guilty. . . .

1836 Va. Acts 44. The Virginia statute required the postmaster to report publications or writings denying the right of masters to their slave property, and abolitionist literature detected in this manner was to be burned in the presence of the justice of the peace. *Id.* The *New York Tribune*, for instance, was banned by a Virginia postmaster under this law in 1859. Curtis, at 30-31.

Another effective tool of ideological suppression was mob violence and intimidation, undeterred by the police powers of the states. The Reverend Elijah Lovejoy, for example, edited the *Observer*, a weekly religious publication dedicated to anti-slavery ideals. After a St. Louis mob destroyed his office, he moved to Alton, Illinois. Lovejoy's press was repeatedly destroyed by angry pro-slavery crowds in Illinois. Finally, a mob set fire to the building containing his press. As Lovejoy fled the burning building, he was fatally shot in the chest. The mayor claimed the crowd was too strong to control. 1 H. Wilson, *History of the Rise and Fall of the Slave Power in America* 374-82 (1872).

Religious abolitionists shared the fundamental tenet that, as natural rights, the civil liberties enumerated in the Constitution should be applied to the states as well as the federal government. Graham, at 491-93. Many Republicans were heavily influenced by the religious movement for abolition, and shared the premise that the Bill of Rights should bind the states. Political leaders of the era who were converted by the abolitionist movement

included Joshua Giddings, Salmon P. Chase and Thaddeus Stevens. *Id.* at 493. Evangelical anti-slavery strongholds in Ohio, New York and Pennsylvania elected such leading Republicans as John Bingham (drafter of section 1 of the Fourteenth Amendment), Philomen Bliss, William Lawrence, Giddings and others to serve in Congress prior to and during the Reconstruction. *Id.* at 492-93, 622-23. An 1856 Republican Party campaign slogan called for "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont." Amar, at 1276.

As the war neared an end, Representative Kasson noted that "the three great ecclesiastical bodies of this country, the Methodist, Presbyterian, and Baptist" had condemned slavery, "and that opposition has run through nearly all the ecclesiastical organizations of the country ever since." The institution of slavery, however, "suppresses freedom of speech and of the press." "Who does not know that innocent ladies, cultivated, intelligent, Christian women, have been driven from the cities and States of the South . . . because they dared to say something offensive to this intolerant spirit of slavery?" Cong. Globe, 38th Cong., 2d Sess. 193 (1865). Congressman Ashley related that slavery "has for many years defied the Government and trampled upon the national Constitution . . . . It has silenced every free pulpit within its control." *Id.* at 138.

The southern history of suppressing abolitionists' speech was a significant concern of the Reconstruction Congress, and the protection of such religious expression was an important impetus in the framing of the Fourteenth Amendment. During debates over the post-war amendments, Congressman Price stated that "for the last

thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State." Cong. Globe, 39th Cong., 1st Sess. 1066 (1866). Congressman Moulton offered a synopsis of the suppression of civil liberties in the states. "There is neither freedom of speech, of the press, or protection of life, liberty, or property." *Id.* at 1617. *See also* Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (remarks of Rep. Orth); Cong. Globe, 38th Cong., 1st Sess. 2615 (1864) (remarks of Rep. Morris); Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871) (remarks of Rep. Bingham).

It is settled law that the Fourteenth Amendment created a constitutional mandate that states adhere to the protections of the Bill of Rights. The abolitionist background leading up to the Fourteenth Amendment suggests that a particularly high constitutional value should be placed on the right of religious individuals to freely express their views. Just as with the history of the First Amendment, the Fourth Circuit's decision again subverts constitutional history by holding that the Religion Clause imposes special disabilities on religious expression.

III. The Fourth Circuit's Decision Will Impoverish Discourse at Public Universities

One unfortunate consequence of the Fourth Circuit's ruling is that it will tend to isolate students from the expression of religious viewpoints on public issues. Religious discourse has played an enormously significant role in our nation's history and in the resolution of many of our most important controversies. The public university is intended to be a marketplace of ideas. *Healy v.*

James, 408 U.S. 169, 180 (1972). By discriminating against student religious speech, the University of Virginia imposes a secularism on the student body that impoverishes campus debate.

From the birth of our nation, religious ideas have played a critical role in our national biography. Religious expression played a significant part in motivating colonists to join the struggle for independence. Historian Arthur M. Schlesinger notes that, along with lawyers, "the clergy provided the most articulate spokesmen for the cause." A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 10 (Northeastern ed., 1980) (1957). Traditional days of fasting and thanksgiving, in the words of British General Gage, provided "an opportunity for Sedition to flow from the Pulpits." *Id.* at 31-32. New England Congregational ministers " 'represented the cause of America as the cause of heaven,' or, as a British sympathizer said, they sounded 'the Yell of Rebellion in the Ears of an ignorant & deluded People.' " *Id.* at 11. Presbyterian clerics in the Middle colonies "proclaimed similar doctrines." *Id.*

In an 1818 letter, John Adams identified Doctor Jonathon Mayhew as "[a]nother gentleman, who had great influence in the commencement of the Revolution." Rossiter, at 228. For instance, in a sermon against *Unlimited Submission*, Mayhew laid out circumstances in which Christians are not obliged to obey the government. *Id.* at 240. Likewise, John Witherspoon, a Presbyterian minister and president of the College of New Jersey (Princeton), "besides writing for the newspapers, became a member of the Second Continental Congress and signed the Declaration of Independence." Schlesinger, at 12.

The role of religious expression in the abolitionist movement has been documented above. Abraham Lincoln similarly filled his speeches with biblical quotations and allusions. *See* G. Wills, *Under God: Religion and American Politics* 207-21 (1990). In one speech, Lincoln speculated that the Civil War was God's judgment on both North and South for the sin of slavery. *Id.* at 218. In the Gettysburg Address, Lincoln drew on New Testament imagery, expressing the desire "that this nation, under God, shall have a new birth." *Id.* at 212.

As a nation, we now celebrate annually the birth of a clergyman. 5 U.S.C. § 6103. The Reverend Martin Luther King, Jr., head of the Southern Christian Leadership Conference, acknowledged the religious roots of the movement for civil rights:

> From the beginning a basic philosophy guided the movement. This guiding principle has since been referred to variously as nonviolent resistance, noncooperation, and passive resistance. But in the first days of the protest none of these expressions was mentioned: the phrase most often heard was "Christian love." It was the Sermon on the Mount, rather than a doctrine of passive resistance, that initially inspired the Negroes of Montgomery to dignified social action. It was Jesus of Nazareth that stirred the Negroes to protest with the creative weapon of love.

A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 16 (J. Washington ed., 1986); *id.* at 17 ("Christ furnished the spirit and motivation, while Gandhi furnished the method."). Before the Lincoln Memorial in Washington, D.C., Dr. King shared his "dream" of the

millennial Kingdom, where "every valley shall be exalted, every hill and mountain shall be made low, the rough places shall be made plain, and the crooked places shall be made straight and the glory of the Lord will be revealed and all flesh shall see it together." *Id.* at 219; Wills, at 203-04.

Numerous other instances could be cited in which our national dialogues have been conducted in explicitly religious terms. These are not simply historical curiosities from a more religious past, but rather reflect an ongoing fact of our communal life. The President recently delivered a sermon in favor of his crime bill at a Maryland church, *New York Times*, Aug. 15, 1994, at A12, and black church leaders have been encouraged to preach about the need for health care reform, *New York Times*, Aug. 24, 1994, at A10.

There is nothing untoward about permitting religious discussion as part of the debate on public university campuses. As former Judge Arlin Adams of the Third Circuit has explained:

> Although the Founders represented a spectrum of views, they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression.

A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 31 (1990). *See id.* at 21 (George Washington), 25 (James Madison), 27 (John Adams).

The Fourth Circuit's decision veers from the religious pluralism of the Founders toward a relentlessly secular society, where religious expression is frowned upon and religious persons are denied the privileges afforded other citizens. Rather than promoting free and open exchange in the marketplace of ideas, the court encourages students to hide the religious bases for their opinions, or leave them unexamined. University students will be less likely to encounter religious perspectives on issues such as racism, crisis pregnancy, homosexuality and the relative morality of capitalism and socialism – all addressed by *Wide Awake*, Pet. App. 6a-7a – even though religious perspectives may play a significant role in dealing with those very issues outside the university context. If religious voices are heard at the University of Virginia, under the Fourth Circuit's ruling, it will be from denominations wealthy enough to supply the funding the school discriminatorily denies. Inevitably, students will graduate with a hollower education than they might have had.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment should be reversed and the case remanded for entry of an order granting the petitioner students' motion for summary judgment.

Respectfully submitted,

EDWARD M. GAFFNEY, JR.
Counsel of Record
Valparaiso University
Law School
656 Greenwich Street
Valparaiso, IN 46383
(219) 465-7833

(10)

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In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS
OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

STEVEN T. MCFARLAND
SAMUEL B. CASEY
Center For Law And
Religious Freedom
Christian Legal Society
4208 Evergreen Lane
Annandale, VA 22003
(703) 642-1070

DOUGLAS LAYCOCK
Counsel of Record
727 East 26th Street
Austin, TX 78705
(512) 471-6988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICI*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Petitioners.

SUMMARY OF ARGUMENT

This case lies at the intersection of two familiar principles from the American tradition of religious liberty. Petitioners rely on the neutrality principle; respondents rely on the no-funding principle. These *amici* attempt to resolve the conflict in a non-arbitrary manner by examining the deeper principles and policies that underlie the positions of the parties.

Substantive neutrality, defined as minimizing government influence on religion, directly serves the ultimate goal of maximizing religious liberty for both believers and nonbelievers. The no-funding principle has often served this goal instrumentally, but on these facts it does not. The policies of the no-funding principle are better served by no funding or by universal funding; the worst possible policy is discriminatory funding, which is the University's policy.

This brief also examines the principal historical controversies that made the no-funding principle prominent in the American understanding of religious liberty. The general assessment proposal in 1784-85 would have funded only religious activities, thus violating both the neutrality and the no-funding principles. The University's discriminatory funding of non-religious and anti-religious speech is in some ways the mirror image of the general assessment; neutral funding of all viewpoints would be better than discriminatory funding of either side.

The other great historical precedent is nineteenth-century Catholic complaints about the Protestant establishment in public schools and the corresponding movement to ban funding of Catholic schools. Nativist Protestants convinced themselves that Protestant religious observances in the public schools were neutral, but that Catholic schools were sectarian. The University has committed an analogous fallacy in claiming that its subsidy of non-religious and anti-religious speech is neutral, and that funding *Wide Awake* would be a forbidden support for religion.

ARGUMENT

I. The Conflict Between the Neutrality Principle and the No-Funding Principle Can Be Resolved by Underlying Principles of Religious Liberty and Substantive Neutrality.

A. The Conflicting Principles.

This case lies at the intersection of two familiar principles from the American tradition of religious liberty. The neutrality principle directs that government be neutral toward religion,[1] neither "advanc[ing] nor inhibit[ing]" religion.[2] Government may not endorse religion, but neither may it "disapprove" religion[3] or endorse the view that religion is wrongheaded or irrelevant.

Because we are here dealing with speech, the neutrality principle of the Religion Clauses is reinforced by the content neutrality and viewpoint neutrality principles of the Free Speech Clause.[4] *Wide Awake* has published

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[1] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-47 (1976) (plurality opinion); Abington School Dist. v. Schempp, 374 U.S. 203, 215, 222, 225-26 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[2] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[3] Wallace v. Jaffree, 472 U.S. 38, 56 n.42 (1985), quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[4] *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

Christian perspectives on racism, sexuality, eating disorders, economic policy, and other contemporary issues.[5] These facts thus illustrate once again what the Court unanimously recognized two years ago: religion is not only a subject matter, but also a source of viewpoints on a wide range of contemporary issues.[6]

A second principle, equally familiar, is the no-funding principle: government generally should not fund religious functions.[7] Government may sometimes fund secular functions performed by religious organizations,[8] but those cases are no precedent for funding religious functions. There is no dispute that the speech to be funded here is religious and that it falls within the natural scope of the no-funding principle.

The neutrality and no-funding principles have generally seemed to be consistent, and the Court has only occasionally been forced to choose between them. When the Court has been forced to choose, the neutrality principle has prevailed. The clearest example is the Court's unanimous holding that state scholarships for the blind

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[5] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 18 F.3d 269, 272-73 & n.7 (4th Cir. 1994).

[6] *Lamb's Chapel*, 113 S. Ct. at 2147-48.

[7] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 619 (1971); Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[8] *See e.g.*, Bowen v. Kendrick, 487 U.S. 589, 608-09 (1988) (sex education); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657-59 (1980) (administration of mandatory testing and monitoring of student attendance); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (cash grants to colleges and universities); Bradfield v. Roberts, 175 U.S. 291 (1899) (medical care).

may be applied to the purely religious program of studying for the ministry in a Bible college.[9] Somewhat analogously, the Court has held that property committed to religious uses may be exempted from taxation pursuant to a neutral scheme of tax exemption for a wide range of secular and religious organizations.[10] And no one has ever brought an Establishment Clause challenge to the income-tax deductibility of contributions to religious organizations. These deductions are not mere tax exemptions; they offset tax that would be due on the taxpayer's salary and investment income. They are therefore like a matching grant to the taxpayer for every contribution. The justification must be that religious contributions are neutrally included in a broad range of contributions to analogous organizations, and that the neutrality principle controls over the no-funding principle.

Here the two principles squarely conflict. The University of Virginia funds a class of student publications that naturally includes religious publications. The neutrality principle forbids the discriminatory exclusion of religious publications. But the University argues, and the Court of Appeals held, that including the religious publications would violate the no-funding principle.

The ultimate question presented is thus to specify the relationship between these conflicting principles in the

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[9] Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986). *See also* Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) (holding that state-paid sign language interpreter for the deaf may be used at Catholic high school to translate both secular and religious instruction).

[10] Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970).

context of religious speech. Are the neutrality principles of the Religion and Speech Clauses subordinate to the no-funding principle, as the Court of Appeals assumed? Or is it the other way around, as this Court has held in other contexts? Or is there some underlying principle that unites these principles and makes their relationship clear?

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence.

There is such an underlying principle. The ultimate goal of the Religion Clauses is religious liberty for all – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The neutrality principle serves this ultimate goal directly. By forbidding government to take positions on religious questions, the neutrality principle minimizes government influence on religious choice, and thus leaves maximum room for private influence and private choice.

The no-funding principle serves this ultimate goal instrumentally. Government money is a powerful source of government influence; government expenditures on

religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious organizations generally maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

These themes of liberty, neutrality, and voluntarism can be integrated into a single standard of substantive neutrality:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from

which to measure encouragement and discouragement.[11]

This elaboration of substantive neutrality synthesizes seemingly separate strands in the American tradition of religious liberty. It attempts to clarify this Court's traditional emphasis on neutrality, to defend that emphasis against academic critics,[12] and to show how neutrality relates to liberty and to voluntarism. This synthesis points the way to a principled resolution here, where each side relies on a different strand from the religious liberty tradition.

This definition of substantive neutrality contrasts with formal neutrality, the mere absence of religious classifications.[13] The University's policy obviously violates formal neutrality, because it expressly defines "religious activities" as a basis for adverse treatment. These *amici* think it more significant that the University's policy also violates substantive neutrality.

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[11] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

[12] *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987). Professor Smith urged the Court to abandon "the illusion that substantive answers can be deduced from the formal idea of neutrality." *Id.* at 331-32. Substantive neutrality moves beyond a mere "formal idea"; it defines "neutrality" in terms of the underlying substantive policies of the Religion Clauses.

[13] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2241-42 (1993) (Souter, J., concurring); Laycock, *supra* note 11, at 999-1006.

The ultimate goal is to maximize religious liberty for believers and nonbelievers alike. The no-funding principle is instrumental – it serves religious liberty under a familiar range of circumstances. But refusal of funding does not serve religious liberty under present circumstances at the University of Virginia.

II. Substantive Neutrality Requires Funding for *Wide Awake*.

A. Government Speech and Private Speech.

The most basic distinction in this case is between religious speech by private citizens and religious speech by government. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[14] Private citizens are free to take any position on religious matters; they are under no obligation to remain neutral. But religious speech by government is forbidden or severely restricted. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . "[15] Government must maintain its neutrality toward religion either by silence on the subject, or by carefully balanced comments, as in a course on comparative religion.[16]

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[14] Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

[15] County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989).

[16] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985); Stone v. Graham, 449 U.S. 39, 41-42 (1980); Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

Both the protections for private speech and the restrictions on government speech follow from the neutrality principle:

> The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.[17]

In a mixed economy, the line between government and the private sector is sometimes difficult to discern. But the task cannot be avoided; the distinction between private and governmental practice of religion is fundamental to the Religion Clauses. The line need not be drawn arbitrarily, or on the basis of a sterile debate over definitions. The principle of substantive neutrality – the ultimate goal of maximizing religious liberty and minimizing government influence on religion – can provide a reasoned basis for drawing the line in close cases.

B. Substantive Neutrality and Student Publications.

The University of Virginia has chosen to enhance private speech by subsidizing student publications. The University is not promulgating any message of its own; indeed, it carefully insists that its funding of student organizations does not mean that it "approves" of the

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[17] Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 3 (1986).

organizations, their activities, or their publications.[18] These publications are not government speech in pursuit of some legitimate government interest. The only government interest is to neutrally enhance the quantity of serious discussion on the campus.

Unfortunately, the University is enhancing private speech in a decidedly non-neutral way. It enhances a wide range of non-religious and anti-religious speech, but it does not enhance religious speech. It paid to print anti-Christian satires in *The Yellow Journal*,[19] it paid to print a range of views on "Faith and Reason" in *Thoughtlines*,[20] and it pays to print secular perspectives on a wide range of issues in fifteen different publications.[21] But it will not pay to print a Christian perspective on many of the same issues in *Wide Awake*. It thus discriminates between different viewpoints about religion; it also discriminates between religious and secular viewpoints on contemporary social issues. There is more non-religious and anti-religious speech on the campus than there would be without the University's enhancement. The University

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[18] *Rosenberger*, 18 F.3d at 270-71.

[19] *See A Christmas Story*, 1 Yellow Journal No. 2; Andrew "Schnoogums" Wallace, *Dick Hickner, Bully for Christ*, 1 Yellow Journal No. 3 at 14-15.

[20] *See* Symposium on *Faith and Reason*, 16 Thoughtlines No. 2 (Fall 1990).

[21] The funding of these publications, including *Thoughtlines* and *The Yellow Journal*, is in the record. *See Rosenberger*, 18 F.3d at 271 & n.3. The Court can read these publications as it would read any other. For convenience, *amici* will attempt to have copies of the publications lodged with the Clerk.

has interfered with the free flow of debate in the private sector, tilting the balance against religious views.

If the University were spending equivalent sums to disseminate its own anti-religious messages, or its own claim that non-religious viewpoints exhaust the range of debate on contemporary social issues, the constitutional violation would be clear. The University's discriminatory subsidy of private speech is analogous to these clear violations, although it is not identical because the University does not lend its own name and credibility to the private messages that it subsidizes. A closer analogy would be this: Suppose the University spent equivalent sums to publish anti-religious messages, or messages urging students to give thoughtful consideration "to the full range of secular viewpoints" on important issues, but it published this propaganda anonymously. Even though the University's name was not attached, this commitment of public funds to reduce the influence of religion would surely be unconstitutional. The University cannot itself take positions on religious questions, or work to exclude religious viewpoints from public debate; neither can it do so indirectly by subsidizing some private viewpoints and not others. If the University subsidizes private speech, it must do so without regard to viewpoint.

A fatal inconsistency lies at the heart of the University's position. The University in effect contends that when it subsidizes non-religious or anti-religious speech, that speech remains private, so that the University has not opposed or marginalized religion. But when it subsidizes religious speech, that speech becomes public, so that the University is supporting religion and violating the Establishment Clause.

The Court of Appeals made an equivalent error: "[I]t would be difficult to view awarding . . . monies to *Wide Awake* as anything but state sponsorship – and therefore advancement – of religious belief."[22] But if this be true, then it must be equally true that awarding money to *The Yellow Journal* is state sponsorship of anti-religious belief, and therefore "inhibition" of religion. Neither the Court of Appeals nor the University can have it both ways.

The University can subsidize the full range of student speech, or it can subsidize no student speech. Or it can subsidize only that student speech that it is willing and legally able to sponsor as an official university publication. Or it can subsidize publications selected on some neutral criterion, such as those publications that serve the largest number of students. But it cannot subsidize private publications selected in whole or in part on the basis of viewpoint. It cannot subsidize only non-religious and anti-religious speech any more than it could subsidize only religious speech.

III. The Policies of the No-Funding Principle Are Better Served by Universal Funding Than by Discriminatory Funding.

The no-funding principle is not an end in itself; it is a means to the end of religious liberty. In a wide range of circumstances, government funding of religious functions threatens religious liberty. Compliance with the no-funding principle generally reduces government influence on the climate of religious opinion, and thus conduces to

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[22] *Rosenberger*, 18 F.3d at 285.

compliance with the neutrality principle. Discretionary funding decisions can distort religious missions; religious groups may tailor their message to qualify for funding. Government is more likely to assert improper control over religious functions if it funds them. And many taxpayers object to being forced to support religious opinions involuntarily, and especially to supporting religious opinions with which they disagree.

Under the current rules at the University of Virginia, one of these reasons for the no-funding principle is of little weight, and the rest have actually become arguments for further funding. We will consider each of these reasons in turn, but the general point is this: The University has already breached the no-funding rule and run afoul of all its policies. The University only makes matters worse by trying to fund some private opinions and not others. The only way to achieve the policies of the no-funding rule is to fund nobody or everybody – to abandon the Student Activities Fund entirely, or to abandon the exclusion of religious views.

A. Neutrality.

The University has not refrained from influencing the climate of religious opinion. Rather, as described above, it is directing its money and influence against religion. It is already flouting the neutrality principle. Because it is already funding non-religious and anti-religious speech, funding religious speech as well would bring it back into compliance with the neutrality principle.

B. Distortion of Religious Messages.

Similarly, it is the University's current policy that requires discretionary decisions that distort religious messages. The University's conception of a "religious activity" is ill-defined, and administered in the first instance by inexperienced undergraduates. The Muslim Students Association, which sponsors speakers and publishes a magazine, is funded.[23] The Jewish Law Students Association, which exists to "encourage Jewish law students to participate in Jewish activities," is funded.[24] The C.S. Lewis Society, which promotes discussion of "literary, moral, and philosophical topics, with a particular emphasis on the work of the 'Oxford Christians,' "[25] is funded – because, the University says, it does not proselytize.[26] Black Voices was funded in 1990-91, when it sang "gospel music as a Black cultural activity," but not in 1991-92, when it began "evangelizing as a religious group."[27] *Wide Awake* is not funded, apparently because it takes its Christianity too seriously.[28]

There is a clear message to the Muslim Students, the Jewish Law Students, the C.S. Lewis Society, and any other religious student groups that may need or desire University funding. They may be funded so long as they keep their religious message muted. They may be funded

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[23] Jt. App. 89.

[24] *Id.* at 97.

[25] *Id.* at 104.

[26] See Brief of Appellees in Court of Appeals at 16 n.7.

[27] *Id.*

[28] *Id.*

if they claim to discuss religion as a cultural artifact and not as a living belief system. Or perhaps they may be funded if they discuss their religion among themselves and do not try to share it with anyone else. The line is not clear; they had best play it safe. These groups can evolve only on lines acceptable to the University, unless they are able and willing to give up their funding. There is an equally clear message to *Wide Awake* and Black Voices: if you really need funding, tone down your message, disguise yourselves as cultural, and apply again next year.

This is exactly the problem the no-funding rule is designed to avoid. The problem is inherent once the University begins to fund a wide range of student groups. The problem would not be avoided by pushing the line back and excluding even more religious speech. That would aggravate the anti-religious discrimination in the system, but it would not relinquish the University's control over groups that need or desire funding. Some places to draw the line may be clearer than others, but wherever the University draws the line, it will be controlling the student groups that fall near it.

Once the University undertakes the business of subsidizing student speech, the only way to avoid control and to approximate neutrality is to fund all student speech, including religious speech, without regard to viewpoint. If there are not enough funds for all that apply, the selection criteria should be unrelated to viewpoint and as objective and nondiscretionary as possible. Funding some viewpoints but not others maximizes control; on these facts, expanding funding would relinquish control.

C. Deliberate Assertions of Control.

The distortion of religious messages under the current program is the natural result of the University's effort to enforce its discriminatory eligibility criteria. Eliminating the discriminatory criteria would largely solve that problem. But a related risk would remain: when government pays the bills, it is more likely to assert control. The University may at some point demand the right to edit or censor funded student publications.

This is a political risk that may or may not come to pass; it is not an inherent or inevitable consequence. The risk is present for all the groups currently funded, and the University has structured the program to minimize the risk. It has stated that it does not control or approve the activities of any funded group,[29] and so far as this record shows, it has kept its word.

If the University succumbed to the temptation to exercise control, it would fundamentally change the nature of the program. The purpose of the Student Activity Fund is not to promulgate the University's message; its only purpose is to enhance student voices and activities. Thus, the current structure of the program provides substantial political protection against University control.

Moreover, so long as the program is structured in this way, there is legal protection against University control. So long as the University merely subsidizes private speech – that is, until and unless it says that subsidized student groups genuinely speak for the University and

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[29] *Rosenberger*, 18 F.3d at 270-71.

deliver the University's message – it cannot legally censor their speech.[30]

If the University were to assert sponsorship and control over funded programs, everything about this case would change. Many fewer student groups would be funded; the University could not in good faith adopt as its own all the disparate messages of the 118 groups currently funded. Certainly it could not adopt inconsistent messages as its own. No group would have a free speech right to have its message adopted as the University's message. The University could not adopt religious messages as its own, but neither could it adopt anti-religious messages as its own. The neutrality principle of the Religion Clauses would continue to bind, but the University would have to comply by taking no position

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[30] *Compare* FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984) (holding that cash subsidy to public television stations does not empower government to bar editorials on those stations); *with* Rust v. Sullivan, 500 U.S. 173, 192-200 (1991) (holding that when government pays private contractors to implement a government program, it can define the scope of the program and insist that no government money be diverted to other purposes); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267-73 (1988) (holding that school could reasonably control content of school-sponsored newspaper produced in journalism class); *see also* Texas Monthly v. Bullock, 489 U.S. 1 (1989) (striking down tax exemption that discriminated between religious and secular publications); Arkansas Writers' Project v. Ragland, 481 U.S. 221, 227-32 (1987) (striking down tax exemption that discriminated on basis of content of magazines). In the lower courts, this Court's principle that government cannot censor subsidized private speech has been applied to subsidized student organizations. *See, e.g.*, Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

on religious questions. Given the University's history of discrimination against religious viewpoints, any claim that it had closed the forum and adopted all messages as its own should be closely scrutinized for continued discrimination in actual practices. *See, e.g., Mergens*, 496 U.S. at 246. But if the University bona fide quit funding any messages other than its own, the neutrality principle and the no-funding principle would then point to the same result.

Thus there is a real and recognizable difference between the University's own speech and a University subsidy for a wide range of student organizations whose speech retains its constitutionally protected status as private speech. This difference means that the risk that the University will assert control is manageable. Under the current program, there are structural, political, and constitutional safeguards against improper assertions of control. Whatever risk remains is modest, and constitutionally far preferable to the gross departure from neutrality in the current distribution of funding.[31]

D. Voluntarism.

The presumptive no-funding principle also protects religious liberty by implementing the voluntarism principle. One application of the voluntarism principle is that taxpayers should not be forced to pay for religion, and especially other people's religion, with tax dollars. Here,

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[31] The distinction between government speech and subsidized private speech is also the central reason why the government's support of its own public schools does not oblige it to fund private schools.

the taxpayers are students who pay a student activity fee of $14 per semester.[32]

But the voluntarism principle was breached long ago, and universal funding would make things better instead of worse. Students at the University of Virginia are already forced to support opinions about religion with which they disagree. Christian students are forced to support *The Yellow Journal*, which openly mocks Christianity. Christian, Hindu, Buddhist, and atheist students are forced to support the Muslim and Jewish student organizations, which reject the central tenets of Christianity and other faiths and belief systems on campus. Evangelical Christians are forced to support the C.S. Lewis Society, which emphasizes rather different lessons from Christianity than those emphasized by *Wide Awake*, and the Lesbian and Gay Student Union,[33] which promotes a very different view of human sexuality than *Wide Awake*.

Nondiscriminatory funding would improve this situation in two related ways. First, it would distribute the burden evenly. As it stands now, students of all faiths and viewpoints must contribute to the fund, but only some faiths and viewpoints can draw from the fund. Nondiscriminatory funding would end that imbalance. Everyone would have to support some things he disagreed with, but it would also be more likely that everyone could find some group that gave him his $14 worth.

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[32] *Rosenberger*, 18 F.3d at 270.

[33] Jt. App. 65.

Second, nondiscriminatory funding would provide a neutral and secular rationale for the whole program. Students would no longer be taxed merely to support certain viewpoints; they would no longer be taxed merely to support non-religious and anti-religious speech. Rather, they would be taxed to neutrally enhance the full range of speech. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect."[34] Similarly, it "would have a secular purpose and would avoid entanglement with religion."[35]

IV. The Historical Controversies That Gave Prominence to the No-Funding Principle Yield No Principled Support for the University's Position.

The no-funding principle looms large in the American tradition of religious liberty because of two historical controversies of great importance. These controversies are a source of understanding of the principle's scope and rationale.

A. The General Assessment.

Financing of churches was the central church-state issue of the 1780s, and immediate background to the adoption of the Establishment Clause in 1791. The single most famous American statement on disestablishment,

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[34] Widmar v. Vincent, 454 U.S. 263, 274 (1981), quoted with approval in Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (plurality opinion).

[35] *Widmar*, 454 U.S. at 270-71; *Mergens*, 496 U.S. at 248, 252-53 (plurality opinion).

James Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion.[36] If history settles anything in this area, it is that a general assessment would be unconstitutional.

But this case is not about a general assessment; indeed, nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular function performed by the church; those who object to funding claim that the function is really religious or that the secular function is insufficiently insulated from religious functions. And whether the function to be funded is religious or secular, modern funding programs always include both secular and religious organizations.

In sharp contrast, the general assessment was a tax solely for the support of clergy in the performance of their religious functions. The assessment was "general" only in the sense that all Christian faiths were included. There were no significant numbers of non-Christians in the polity, so the assessment was effectively neutral among religions then represented in Virginia.

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[36] Both the *Memorial and Remonstrance* and the general assessment bill are reprinted in Everson v. Board of Educ., 330 U.S. 1, 63-74 (1947) (appendix to opinion of Rutledge, J., dissenting).

However, it was not neutral as between religion and non-religion. The reason for supporting religious functions was not that they fell within the neutrally-drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value.

The essence of *Wide Awake*'s claim to be included in the Student Activities Fund is to end discrimination between religious and non-religious viewpoints. But the essence of the general assessment was massive discrimination in favor of religious viewpoints: in a time of minimal government, religious viewpoints were to be singled out for a special subsidy. The no-funding principle as applied to the general assessment was fully consistent with the neutrality principle. But the no-funding principle as applied to *Wide Awake* is fundamentally inconsistent with the neutrality principle. Rejection of the general assessment is no precedent for refusing to fund *Wide Awake*.

B. Protestant-Catholic Conflict.

The other great controversy that gave prominence to the no-funding principle was the nineteenth-century dispute over common schools. Over a period of decades, and amidst great controversy, Americans built up the public schools and withdrew funding from religious schools.[37]

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[37] For accounts of these developments and the associated controversies, see Charles Glenn, *The Myth of the Common School* (Univ. of Mass. Press 1988); James Hennesey, *American Catholics:*

Thirty-two states adopted constitutional provisions expressly prohibiting public funding of religious schools.[38]

This controversy, the details of which have been largely forgotten, is the source of the tradition that school funding is an especially important issue in the separation of church and state. And the continuing disputes over that issue are a principal source of the sense that "direct monetary subsidization . . . is a beast of an entirely different color"[39] – distinguishable from access to facilities and other rights subject to the neutrality principle.

The nineteenth-century resolution of the school-funding controversy arguably represents a political judgment on the constitutional questions raised by such funding. But there are difficulties with relying on that political judgment, even with respect to schools. It is especially dangerous to abstract from that judgment a bright-line rule that applies to all contexts and overrides competing principles of religious neutrality and freedom of speech. It is dangerous to reason from premises derived from an

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A History of the Roman Catholic Community in the United States 182-83, 185-86 (Oxford Univ. Press 1981); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (Hill & Wang 1983); Diane Ravitch, *The Great School Wars* 3-76 (Basic Books 1974); Anson Phelps Stokes, 2 *Church and State in the United States* 47-72, 642-54, 681-86, 722-28 (Harper Bros. 1950).

[38] For a list, see Carl Zollman, *American Church Law* §§ 65-66 at 78-80 (West 2d. ed. 1933). For additional background, see Glenn, *supra* note 37, at 251-53. For examples, see Cal. Const. art. IX, § 8; N.Y. Const. art. XI, § 3; Tex. Const. art. 7, § 5(a).

[39] *Rosenberger*, 18 F.3d at 286.

old dispute without examining the dispute and the premises.

One difficulty with reasoning from nineteenth-century rejection of funding for religious schools is that that rejection was not part of the background to the First Amendment. And although the movement against funding religious schools amended many state constitutions, it conspicuously failed in its attempt to amend the federal Constitution.[40]

Perhaps more important, the nineteenth-century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were good arguments to be made on both sides, the nineteenth-century opposition to funding religious schools drew heavily on anti-Catholicism. Nativist opposition to Catholic immigration fluctuated after 1825, but it never disappeared. Anti-Catholic secret societies, such as the Know Nothings and the American Protective Association, occasionally grew large enough to influence elections,[41] and there was occasional mob violence and burnings of Catholic churches and convents.[42]

The movement for a federal constitutional amendment began with President Grant's 1875 warning against

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[40] See *infra* at 27.

[41] *See, e.g.*, David H. Bennett, *The Party of Fear* 105-16, 159-82 (Univ. of N. Carolina Press 1988); Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 140-80 (Univ. of Washington Press 1964); 1 Stokes, *supra* note 37, at 825-38.

[42] Kaestle, *supra* note 37, at 170; Ravitch, *supra* note 37, at 36, 66, 75; 1 Stokes, *supra* note 37, at 817-22, 824, 830-31.

a potential national conflict "between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other."[43] In context, there is no doubt that the feared source of "superstition, ambition and ignorance" was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country. The preventive that the President proposed was to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school."[44]

Catholics argued that Protestant religious practices in the public schools made those schools as sectarian as any private school. Public schools commonly read the King James Bible ("the Protestant Bible") "without note or comment."[45] Catholics noted that "the reading of the Scriptures as a public ceremony is as distinctive to them [Protestants], as the celebration of Mass would be to Catholics."[46]

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[43] Speech to the Army of the Tennessee (Sept. 29, 1875) (manuscript and typescript in the Ulysses S. Grant Papers in the Library of Congress; reproduced on reel 5 of the microfilm edition).

[44] *Id.* The President requested a constitutional amendment to this effect in his Annual Message to Congress (Dec. 7, 1875), reprinted in James D. Richardson, 7 *Messages and Papers of the Presidents* 332, 334 (1898).

[45] For accounts of the Protestant Bible controversy, see Glenn, *supra* note 37, at 196-204; Kaestle, *supra* note 37, at 98-99, 166-71; Ravitch, *supra* note 37, at 3-76; 1 Stokes, *supra* note 37, at 825-32.

[46] *The President's Speech at Des Moines*, 22 Catholic World 433, 438 (1876).

Senator James G. Blaine proposed a constitutional amendment to implement the President's proposal. The Blaine Amendment would have codified the Protestant position by expressly permitting Bible reading in the public schools but forbidding any use of state or federal funds to support religious schools.[47] This amendment was narrowly defeated by Democrats in the Senate; one of Blaine's supporters later denounced the Democrats as "the party of Rum, Romanism, and Rebellion."[48]

Whatever the merits of the tradition against state funding for church-affiliated schools, its origin was not a proud moment in our constitutional history. These nineteenth-century debates did not produce a principled resolution to a difficult problem. Badly tainted by anti-Catholicism, they produced instead a Nativist Protestant victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools;[49] Catholics continued their long effort to build and finance private schools. In modern times, the Court has struggled with the difficult issues raised by the combination of secular and religious functions in church-

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[47] For the text of the amendment with discussion, see Glenn, *supra* note 37, at 252-53; 2 Stokes, *supra* note 37, at 68-69, 722-28; Zollman, *supra* note 38, § 62 at 75-76.

[48] See Arthur Schlesinger, ed., *History of American Presidential Elections 1789-1968* at 1606 (Chelsea House 1971).

[49] See Jonathan D. Sarna, *American Jews and Church-State Relations* 14-31 (American Jewish Committee 1989).

affiliated schools, and those issues are of course not presented here.

The University's position is essentially analogous to the position of the nineteenth-century Nativist Protestants. The University is far more inclusive, but it makes the same analytic error with respect to the groups it excludes. The University includes in its funding program non-religious, anti-religious, and even mutedly-religious voices. It excludes other religious voices. And it proclaims the program neutral and takes offense when the excluded voices object to its discrimination. The essential nature of the problem is not changed by whose ox is gored. It is irrelevant that anti-religious voices are now favored instead of disfavored, or that Protestant voices are now disfavored instead of favored. Discrimination in any direction violates the University's obligation of substantive neutrality toward religion.

In an activist state with a mixed economy, there will arise many different issues concerning neutrality and funding, and different factual contexts will require different solutions. This Court must reason such issues out from first principles; we have tried to assist that process in the first three parts of this brief. The relevance of the nineteenth century Protestant-Catholic conflict is principally as a warning not to beg questions. The Court should not unwittingly reason from a premise rooted in nineteenth-century anti-Catholicism.

CONCLUSION

The central command of the Religion Clauses is that government should minimize its influence on religious belief and practice. The University has violated that command. It has spent its funds to enhance private speech in discriminatory ways, distorting private debate in a manner that is hostile to religion in general and to *Wide Awake*'s outspoken style of religion in particular. And it has distributed an entitlement on the basis of religion, thus pressuring students to choose secular activities over religious ones or to conform their religious activities to the University's preferred mode.

The judgment should be reversed and the case remanded for entry of an order granting the petitioner students' motion for summary judgment.

Respectfully submitted,

Steven T. McFarland
Samuel B. Casey
Center For Law And
Religious Freedom
Christial Legal Society
4208 Evergreen Lane
Annandale, VA 22003
(703) 642-1070

Douglas Laycock
Counsel of Record
727 East 26th Street
Austin, TX 78705
(512) 471-6988

December 15, 1994

APPENDIX

STATEMENTS OF INTEREST

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980. These include *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2142 (1993); and *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993).

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the

first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

The Southern Baptist Convention (SBC) is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life Commission (CLC) is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

Family Research Council (FRC) conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

Home School Legal Defense Association (HSLDA) provides legal defense for its 45,000 member-families nationwide that are home schooling their children. Frequently, HSLDA defends these homeschool families by asserting their constitutional rights to free exercise of religion. HSLDA is a non-profit association dedicated to preserving the fundamental right of parents to remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. HSLDA was formed in 1983 and is currently headquartered in Paeonian Springs, Virginia, in the greater Washington, D.C. area.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBERT M. RADER
Counsel of Record
DONN C. MEINDERTSMA
KAREN L. GRUBBER
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
*Counsel for Amicus Curiae
Intercollegiate Studies
Institute*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

Amicus Intercollegiate Studies Institute ("ISI") supports the petitioners and urges the Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit. Pursuant to Supreme Court Rule 37.3, ISI has obtained consent to file this brief from counsel for petitioners and counsel for respondents. Correspondence indicating the parties' consent has been filed with the Clerk.

ISI is a nonprofit, nonpartisan, tax-exempt organization that was founded in 1953 to instill among college students an understanding of the values and institutions

that sustain a free society and to nurture in these future leaders an allegiance to the American ideal of ordered liberty. Through an integrated program of lectures, conferences, publications, and fellowships, ISI fosters student appreciation of our Nation's founding principles of limited government, individual liberty, personal responsibility, free enterprise, and moral standards.

ISI maintains a network of more than fifty thousand members and volunteer representatives that reaches nearly every college campus in the United States. Each year, over twenty-five hundred ISI student members and faculty associates assist in the organization of ISI-sponsored activities on more than one thousand college campuses.

ISI publishes four journals—one written entirely by college students—with an annual circulation of more than 850,000 copies. ISI also publishes books, texts, and reprints by leading scholars and authors. In addition, ISI annually awards tuition and stipend fellowships to graduate students who are committed to perpetuating our Nation's heritage by teaching liberal arts at the undergraduate level. To date, nearly four hundred educators have benefitted from these fellowships.

ISI annually sponsors over three hundred lectures at colleges and preparatory schools. ISI also sponsors approximately forty conferences each year, including four regional leadership conferences and two summer schools. ISI's efforts to bring noted speakers to campuses are frequently thwarted, however, when schools refuse to subsidize the speakers' fees because of the religious or political content of the speakers' proposed comments.

As a nationally prominent student-oriented organization, ISI has a compelling interest in addressing the Free Speech and Establishment Clause issues raised by the court of appeals' decision from the perspective of the thousands of college and university students who are directly affected by the decisions of school administrators and committees that may restrict political, religious, and

philosophical expression by students. Academic freedom is central to ISI's program and philosophy and is necessary for their propagation. Decisionmaking by school administrators that restricts student free speech solely for viewpoint-based reasons is anathema to ISI's philosophy and injurious to ISI's program.

The court of appeals' decision not only permits, but virtually compels, the University of Virginia to abridge the free speech rights of a student organization founded in accordance with University guidelines. Those guidelines bar this otherwise eligible organization from receiving reimbursement from a pool of fees collected for the very purpose of repaying student organizations for the costs of publications and other campus activities. Accordingly, ISI supports petitioners in urging the Court to reverse the judgment below.

STATEMENT OF THE CASE

On July 11, 1991, petitioners Ronald W. Rosenberger, et al., brought an action against the Rector and Visitors of the University of Virginia and Associate Dean of Students Ronald J. Stump ("respondents" or "the University") pursuant to 42 U.S.C. § 1983. Petitioners are University students who challenge the constitutionality of the University's guidelines for the distribution of monies from the University's Student Activities Fund ("SAF" or "the Fund"). The University collects a mandatory student activities fee from all students, deposits the fees into the SAF, and then, via approval of the University's Student Council, disburses the monies to support "the wide variety of student organizations, activities, and publications that function at the University." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 270 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994). If the Student Council disapproves the funding request, an appeal may be made to the Student Activities Committee, chaired by a designee of the Vice President for Student Affairs,

which makes a final decision. *Id.* at 271; J.A. 75-76.[1] Funds do not go directly to student organizations, but rather are used only to reimburse expenses incurred by those organizations. *Rosenberger*, 18 F.3d at 271.

In September 1990, petitioners formed Wide Awake Productions. This student organization published *Wide Awake*, a magazine designed to facilitate "philosophical and religious expression" on campus. *Id.* During the 1990-91 academic year, the University funded through reallocated student fees fifteen student publications that promoted diverse viewpoints (*Id.* at 271 & n.3)[2] but denied Wide Awake Productions' request for reimbursement of the expenses the students incurred in printing *Wide Awake*. The University admittedly singled out Wide Awake Productions for discriminatory treatment because the guidelines broadly forbid the allocation of funds to "religious activities." *Id.* at 273-74.

Although disqualifying Wide Awake Productions for funding because of its "religious activities" (J.A. 81), the Associate Dean of Students acknowledged that the "Student Council has funded publications and media groups which have expressed religious opinions and similar matter[s] as an incidental part of their activities" (J.A. 103). The same official could not quantify the difference between Wide Awake Productions and other student organizations in their degree of religious activity, but asserted that the "reason for these groups' existence and the nature of the activities themselves are not to evangelize or to *principally* express a religious perspective." J.A. 103 (emphasis added). As the official's statment suggests, any difference between Wide Awake Productions and funded

[1] "J.A." citations are to the Joint Appendix filed with the court of appeals below.

[2] In addition, over 100 student organizations, including the Muslim Students Association and the Jewish Law Students Association, also obtained expense reimbursement from the Fund during the relevant time period. *Rosenberger*, 18 F.3d at 271.

student organizations in regard to expressions from a religious perspective or viewpoint appears to be more a matter of degree than content of religious thought. *See* J.A. 116, 119 (stating that the objective of the Muslim Students Association is "to promote a better understanding of Islam"); J.A. 122 (discussing a lecture on "Judaism and Homosexual Rights" by Rabbi Kaye); J.A. 128 (noting the study of the work of Oxford Christians by the C. S. Lewis Society).[3]

The United States Court of Appeals for the Fourth Circuit ruled that the funding guidelines violated the petitioners' First Amendment free speech rights. As a result of the guidelines, "religious expression . . . is never allowed to compete for funds with other forms of speech that might be indulged by University students." *Rosenberger*, 18 F.3d at 280. Despite the conspicuous Free Speech Clause violation, the court of appeals found that the University's discriminatory treatment of petitioners was "justifie[d]" by the Establishment Clause. *Id.* at 286. According to the court, reimbursement of Wide Awake's printing costs would have the "primary effect" of advancing religion and would cause excessive entanglement between the state and religion. *Id.* at 285, 286. Having found that the University's Establishment Clause fears justified the abridgement of free speech rights, the court of appeals rejected petitioners' challenge under 42 U.S.C. § 1983 that the guidelines are unconstitutional.

The court of appeals frankly acknowledged that respondents' "erection of a prior restraint against University funding of such 'religious activities' as the publication of religious expression in *Wide Awake* constitutes . . . a penalty" against the "exercise of constitutional rights [by petitioners] by withholding from their possessors an otherwise discretionary benefit." *Id.* at 281. In other words, the funding prohibition restrains petitioners "from gain-

[3] Ironically, a discussion of C. S. Lewis's views on free will and moral responsibility was a central feature of one *Wide Awake* issue. J.A. 132, 139-41.

ing access altogether to a funding source generally available to [other student organizations] not engaged in religious expression." *Id.* As the court of appeals correctly concluded, the funding prohibition "thus creates an uneven playing field on which the advantage is tilted towards [other student organizations] engaged in wholly secular modes of expression." *Id.* In this regard, the court accepted petitioners' contention that once respondents "have chosen to promulgate guidelines governing the allocation of funds that support student speech among competing student interests, such guidelines cannot condition funding awards on the content or viewpoint of a prospective recipient's speech." *Id.* at 279.

To determine whether different treatment of funding eligibility could be justified by admittedly content- and viewpoint-based factors, the court of appeals searched the guidelines' prohibition against funding "religious activities" for "a compelling state interest [that] is narrowly drawn to achieve that end." *Id.* at 281. The court found that avoiding the creation of an "establishment" of religion at the University may be characterized as "compelling." *Id.* at 282. Following the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court of appeals found that each prong of the test favored the funding proscription.

On the first prong, the court of appeals found that the respondents' purpose in denying SAF funding to "religious activities" was to comply with the University's educational function, which it characterized as a "facially secular legislative purpose." *Rosenberger*, 18 F.3d at 284. Put differently, the approved purpose lay "in preserving University funds for the institution's educational mission." *Id.* On the second prong, the court of appeals found that the primary effect of the SAF guidelines was neither to inhibit nor advance religion. The court stated that the University's policy of allowing petitioners "open access to campus facilities accords [them] ample opportunity to express their religious views," and that the respondents' funding policy "simply declines to take the additional step of actively subscribing University funds to *Wide Awake's* particular religious perspective." *Id.* at 285. The court further stated that "it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief." *Id.* On the third prong, the court of appeals found that the "potentially divisive political effect" of providing SAF monies to defray the publication cost of *Wide Awake* would create excessive government entanglement with religion. *Id.* at 286. The court held that such funding would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Id.*

SUMMARY OF THE ARGUMENT

The judgment below is incorrect. Because our Nation "is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us," special solicitude is given the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Fullest protection of free speech rights at our Nation's institutions of higher learning requires vigilant scrutiny of restrictions upon speech, not only in classrooms themselves but throughout the entire environs of university and college campuses. Foremost among the most protected expression of free speech is that which implicates the free exercise of religion, and this is no less true on university campuses than elsewhere. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("[U]niversities are not enclaves immune from the sweep of the First Amendment."). Such expression is entitled to "special constitutional solicitude," and any proscription or regulation of speech because of its religious content is subject to "the most exacting scrutiny." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). The court of appeals correctly held

that the University's viewpoint-based discrimination violates the Free Speech and Press Clause, but erred in holding that the Establishment Clause compels such a result.

At the heart of the Establishment Clause lies the principle that government may not favor or endorse one religion over another or religion over nonreligion in general. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2491 (1994); *Lee v. Weisman*, 112 S. Ct. 2649, 2676 (1992) (Souter, Stevens, and O'Connor, JJ., concurring). By the same token, the Establishment Clause does not require government "to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). In seeking equal access to pooled student activity fees used to reimburse a broad spectrum of student organizations (including fifteen other student publications on campus) petitioners seek neither favoritism nor endorsement for their religious views but only to be included in a secular program on an equal footing with nonreligious fund recipients.

This Court has "frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Grumet*, 114 S. Ct. at 2491. While the Establishment Clause commands neutrality to religious organizations and religious adherents in the dispensation of government benefits, the need for even-handed neutrality is underscored when disallowance of the benefit would otherwise constitute "overt viewpoint-based discrimination [that] contradicts the Speech Clause." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring). Here, viewpoint-based discrimination by virtue of University guidelines that proscribe funding for religious activities is undisputed. The court of appeals erred in finding that this discrimination was necessary to avoid an establishment of religion. Its convoluted analysis inappropriately focused

on the asserted justification for the guidelines rather than the factors under *Lemon* which, if satisfied, would have allowed petitioners' activities to be funded. The court below thereby ignored the precedents of this Court, which found the sharing of generally available benefits by religious and nonreligious alike wholly compatible with the Establishment Clause.

ARGUMENT

The court of appeals correctly determined that there was a violation of the Free Speech Clause. The court concluded that plaintiffs' publication of religious speech in *Wide Awake* was protected by the Speech and Press Clause. *Rosenberger*, 18 F.3d at 280. Further, the court agreed that, under SAF guidelines, "religious expression, such as that in *Wide Awake*, is never allowed to compete for funds with other forms of speech that might be indulged by University students." *Id.* The court recognized this as a prior restraint on religious expression in violation of the constitutional precept that, while a student organization has no right to funding by the University, funds generally available "must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity." *Id.* at 281. Thus, the University's proscription against funding religious activities "creates an uneven playing field on which the advantage is tilted towards [student organizations] engaged in wholly secular modes of expression." *Id.* Hence, the court examined whether the University's proscription against funding "religious activities" was necessary to avoid "establishment" of religion at the University. *Id.* at 286.

Although it ultimately reached an erroneous conclusion, the court of appeals developed a proper decisionmaking framework for resolving the apparent conflict between the Free Speech and Establishment Clauses. The discussion of secular topics from a religious viewpoint within a public institution plainly implicates the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). Fur-

ther, the state has a compelling interest in avoiding an Establishment Clause violation that may justify an abridgment of free speech and press rights if the proscription is "narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270; *Lamb's Chapel*, 113 S. Ct. at 2148.

The fundamental problem in the court's analysis is that it did not follow this constitutional inquiry throughout its opinion. To determine whether the funding proscription was necessary to avoid an establishment of religion, the court below—following the precedents of this Court—should have required the University to demonstrate that the hypothetical funding of Wide Awake Productions would, under *Lemon*, violate the Establishment Clause. *Lamb's Chapel*, 113 S. Ct. at 2148; *Board of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar*, 454 U.S. at 271-75. In each of those cases, this Court hypothetically assumed equal access to the governmental benefit sought by a religious organization or religious adherents and required the state to prove that the shared access would be incompatible with the Establishment Clause. The state bears a " 'heavy burden' " in demonstrating that such incompatibility exists. *Widmar*, 454 U.S. at 270 n.7 (quoting *Healy*, 408 U.S. at 184).

Instead of such an analysis, the court below often switched its focus to whether the funding proscription itself were compatible with the Establishment Clause. This is not an insignificant or merely semantic difference but rather a drastic change in perspective with a predictably different outcome. If the University may legally abridge the acknowledged free speech rights of petitioners only by showing a compelling interest in avoiding an establishment of religion that would otherwise occur, it is up to the University to prove that funding petitioners would indeed create a situation "incompatible" with the Establishment Clause. Instead, the court of appeals focused upon whether the purpose and effect of the funding proscription furthered the University's policy of avoiding an unproven

establishment of religion. This unwarranted shift in focus led to a convoluted analysis of the *Lemon* criteria.

1. Nowhere was the court's analysis more troublesome in this respect than in the first prong of *Lemon*. Following "equal access" precedent, the court below should have evaluated the hypothetical SAF funding of Wide Awake Productions to determine whether a legitimate secular purpose could be found. The requirement of a "secular purpose" under this prong "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). Instead, the court focused upon the "purpose that animated" the respondents' adoption of the SAF guidelines proscribing the funding of "religious activities" (*Rosenberger*, 18 F.3d at 283) and found the University had a secular purpose in "avoiding an establishment of religion" at the University (*id.* at 284). While true, this is irrelevant; the guidelines themselves were not under challenge as an establishment of religion but as an abridgement of free speech and press rights. Instead, the court of appeals should have considered whether the creation of a student activities fund generally benefiting numerous student organizations, including some which would comment on student activities and other matters of concern to students from a religious perspective, evidences a secular purpose by fulfilling the overall educational objectives of the University.

The answer to this inquiry is unmistakably affirmative. The funding of more than one hundred student organizations of such diverse composition, purposes, and objectives as exist at the University, hypothetically including Wide Awake Productions, clearly reflects a secular purpose. The purpose of the student activity fee is "to provide financial support for student organizations that are related to the educational purpose" of the University. J.A. 74. By ex-

amining the dozens of organizations and numerous publications already funded by the SAF (*Rosenberger*, 18 F.3d at 271), the court should have held that the University would not be "abandoning [the] secular purposes" of the SAF by the inclusion of *Wide Awake* among other student publications expressing views on activities or issues of interest to students. *Gillette v. United States*, 401 U.S. 437, 450 (1971). Indeed, the principal justification for collecting and disbursing student activities fees is "the educational necessity of exposing the university community to a diversity of responsible opinion," striving for balance and an adequate opportunity for opposing viewpoints. *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

This Court has unambiguously held that a secular purpose exists in the creation of a university's open forum policy by which students can exchange ideas, including religious speech. *Widmar*, 454 U.S. at 271 & n.10. Nor would including *Wide Awake* among the host of other funded University publications involve any different "secular purpose" than that approved by this Court in guaranteeing equal access to governmental benefits by religious adherents at the public secondary school in *Mergens*, 496 U.S. at 248. In fact, a University policy treating religious viewpoints even-handedly would easily pass the first prong of *Lemon* because the "avowed purpose" of preventing discrimination "against religious and other types of speech . . . is undeniably secular." *Id.* at 249. This would be true even if a University official personally believed "that religious speech in particular was valuable and worthy of protection" inasmuch as a neutral policy would guarantee "equal access to both secular and religious speech." *Id.*; *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting) (stating that protection of free exercise concerns and maintenance of necessary neutrality toward religion have a secular purpose and effect).

2. In examining the second prong of *Lemon*, the court of appeals similarly erred in focusing on "whether the primary effect of the guidelines' restrictions is to inhibit or advance religion." *Rosenberger*, 18 F.3d at 284-85. Here again, the court's misguided focus was upon the SAF funding guidelines rather than the hypothetical funding of Wide Awake Productions. In effect, the court of appeals simply created a straw man to knock down; petitioner has never claimed that the First Amendment can "be metamorphosed into a promise" that the government will subsidize all speech. *Id.* at 277. Rather, petitioners merely assert that SAF funds available to student groups at the University generally must be distributed in a viewpoint-neutral manner, offering Wide Awake Productions an equal opportunity to compete for funding. The court of appeals therefore erred in casting the issue as whether the University's "refusal to subsidize [*Wide Awake*] directly" violates the Establishment Clause by inhibiting religion. *Id.* at 285.

In determining whether the receipt of SAF funds by petitioners would advance religion, the court of appeals correctly focused on the distribution of funds rather than the effect of the SAF guidelines but reached an erroneous conclusion. First, the court mischaracterized the SAF funds sought by petitioners and otherwise available to qualifying organizations on an equal basis consistent with educational objectives. Because the court mischaracterized SAF funding as a University "subsidy" (*e.g.*, *id.*), it drew erroneous conclusions regarding the degree of University support for *Wide Awake* or those other campus publications that are funded. In reality, the University's reimbursement of a student organization's publishing costs through the SAF is completely different in *nature and form* from the state financial aid to religious institutions disallowed in such "cash subsidy" cases as *Lemon*. Such subsidies involve an award of state aid from the general coffers of the government. SAF funding, by contrast, is merely the redistribution of student activity fees collected

for the specific purpose of funding a variety of student activities, including publications such as *Wide Awake*. Moreover, the funds are distributed directly to the creditors of student groups upon submission of expense vouchers to the SAF. *Id.* at 271. This assures that funds will not be misused for unapproved, nonsecular purposes and that the appearance of secular propriety is maintained. Like the tax exemption approved in *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664 (1970), or the tax deduction approved in *Mueller v. Allen*, 463 U.S. 388 (1983), SAF disbursements involve no new, additional revenues being taken from the general tax coffers to support religious organizations or activities. Rather, the University's reimbursement of student expenses is a closed-loop system in which only revenues generated for the entire spectrum of student activities are utilized to support those activities. The University acts as an administrator and conduit in assuring that the student fees are appropriately distributed in accordance with educational objectives and, therefore, is obligated to obey the Free Speech and Press Clause, but the reimbursement sought by petitioners for their publication is not truly a subsidy much less "government largesse." *Rosenberger*, 18 F.3d at 279.

Even characterizing the SAF funding as a "subsidy," if it were such, is not constitutionally dispositive. For example, although every tax exemption constitutes a subsidy in some sense, this Court has upheld such a subsidy "[i]nsofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end," even though "religious groups benefit incidentally." *Texas Monthly*, 489 U.S. at 14-15. It could not be more clear that the government may lawfully reimburse private persons for expenses incurred in fulfilling the secular purposes of education even though religion may be incidentally advanced. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947). Accordingly, the court of

appeals erred in treating the funding element of the SAF program as dispositive under the second prong of *Lemon*.

Further, the *governmental involvement* in SAF funding is far more passive and removed than with the grant of a cash subsidy by the state to a religious institution. As the court below correctly found, the University, in effect, oversees the redistribution of activity fees collected from students and deposited in the SAF to support a broad spectrum of student organizations, activities, and publications at the University. *Rosenberger*, 18 F.3d at 271. But primary responsibility for distribution of funds belongs to the University's Student Council. *Id.* Only after internal appeals are exhausted before the full Student Council may the organization denied funding seek review and a final decision by the University's Student Activities Committee, a faculty body chaired by the designee of the Vice President for Student Affairs.

Therefore, if Wide Awake Productions had not been denied funding by virtue of the guidelines, only the Student Council would have authorized the funding, and no University official would have been directly involved. The court of appeals gave little or no weight to the actual decisionmaking process in SAF fund distribution in determining whether religion would be advanced by the government if Wide Awake Productions were granted funds on an equal footing with other eligible groups. For this reason, the court of appeals exaggerated the extent to which the University actually placed, or may be perceived to place, its imprimatur upon the distribution of SAF funds so as to advance religion.

The court of appeals also misinterpreted this Court's decisions defining the constitutionally permissible benefits that religious organizations may achieve incidentally through the fulfillment of secular objectives. The court below focused upon Wide Awake Productions as an individual recipient of reimbursement for its publication, but ignored the educational benefits to the University in

the larger context in which the SAF supports a broad spectrum of activities of which *Wide Awake* would be but one. *Id.* at 284-85. The University would not have been making a special grant to petitioners or to students engaged solely in religious activities. Rather, the University has funded over a hundred diverse organizations, some that have pedantic, philosophic, or even ontologic concerns, and others that are more mundane. All, however, are broadly encompassed by the University's educational purpose in fostering thought, understanding, and expression.

Any incidental benefit to religion in the University's achievement of this secular objective does not run afoul of the Establishment Clause. As this Court has held:

> The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals *merely because they would thereby relieve religious groups of costs they would otherwise incur.*

Texas Monthly, 489 U.S. at 10 (emphasis added). Or, as more recently explained:

> [This Court has] consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2466 (1993).

To assure that no impermissible advancement of religion or excessive entanglement with religion exists, this Court has required a factual demonstration of "the general availability of any benefit provided religious groups or individuals." *Grumet*, 114 S. Ct. at 2491. As in earlier cases, the availability of funding here "to a broad

class of nonreligious as well as religious speakers," among "over 100 recognized student groups" (*Rosenberger*, 18 F.3d at 271) at the University demonstrates secularity in the "provision of benefits to so broad a spectrum of groups." *Widmar*, 454 U.S. at 274; *see also Grumet*, 114 S. Ct. at 2491-92; *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248.

Nor is the court of appeals' characterization of petitioners' activities as "proselytizing" (*Rosenberger*, 18 F.3d at 285) constitutionally relevant. This Court's precedents "plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). To render Wide Awake Productions ineligible for funding is not constitutionally compelled just because Wide Awake expresses a religious perspective on issues and topics of student interest frequently addressed by other student groups, even if religion is thereby advanced. As this Court held in *Lamb's Chapel*, when school authorities sought to restrict use of school property "for the purpose of proselytizing," such reasoning cannot be defended "to deny the presentation of a *religious point of view* about a subject the [School] District *otherwise makes open to discussion* on District property." 113 S. Ct. at 2148 (emphasis added). Whether characterized as proselytizing or discussing the same subject as others but from a religious point of view, the funding sought by petitions "is not unconstitutional simply because it *allows* [petitioners] to advance religion"; there are no forbidden "effects" under *Lemon* unless "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

Thus, the University cannot constitutionally fund a discussion, for example, of homosexuality or the ideas of C. S. Lewis (J.A. 122, 128), while excluding petitioners from the same funding to discuss the same issues from a different perspective (*Rosenberger*, 18 F.3d at 272). The Establishment Clause "must not be construed as some

sort of homogenizing solvent that forces . . . religious groups" to choose between their religious ideals and mainstream nonreligious or irreligious culture at the risk of exclusion from benefits generally available to others. *Grumet*, 114 S. Ct. at 2505 (Kennedy, J., concurring).

3. The court of appeals' examination of the third prong of *Lemon* is also in error. Owing to the *nature and form* of the SAF as a pool of fees collected and reallocated for the very purpose of funding student activities (as well as the limited *governmental involvement* in overseeing this student-administered process), there is far less potential for "excessive entanglement" than the court below found. Because University officials are generally removed from the allocation and disbursement process (except to assure that funds are used only for approved purposes) and certainly have little to do with the funded activities themselves, the University would not in fact be associated with the publication of *Wide Awake*. Accordingly, there would be no "purposeful and forbidden 'fusion of governmental and religious functions' " like that condemned in *Grumet*, 114 S. Ct. at 2490 (quoting *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982)).

To the contrary, as in *Widmar* and *Mergens*, " 'the University would risk greater "entanglement" by attempting to enforce its exclusion of religious activities from otherwise available benefits.' " *Mergens*, 496 U.S. at 248 (quoting *Widmar*, 454 U.S. at 272 n.11). Deciding which publications are religious or how many articles of a religious nature render the publication or a particular issue "religious" is itself an entanglement best avoided. As precedent further instructs, the University's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." *Id.* at 251 (citing *Widmar*, 454 U.S. at 274 n.14). By explanation or even express disclaimers in University funding guidelines, funding applications, the student handbook, or other means, "students will reasonably understand that the school's [funding of

Wide Awake] . . . evinces neutrality toward, rather than endorsement of, religious speech. *Id.*

The court of appeals disregarded the University's ability to disassociate itself from funded activities in citing the "potentially divisive political effect" of funding Wide Awake Productions as the principal feature of "excessive entanglement." *Rosenberger*, 18 F.3d at 286. The court predicted that the "possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the University of Virginia." *Id.* The court of appeals held that, because *Wide Awake* is "pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," funding the publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Id.*

In so holding, the court below not only overlooked the University's control over student perceptions but also disregarded this Court's longstanding recognition that University students possess sufficient maturity and understanding to distinguish student-initiated speech from that which the University sponsors or endorses. Nowhere has this Court made the distinction more clear than in *Widmar*, in which this Court aptly observed:

> University students are, of course young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. . . . In light of the large number of groups meeting on campus, . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, or opinions of any organization or its members."

454 U.S. at 274 n.14. Similarly, in *Tilton v. Richardson*, 403 U.S. 672, 685 (1971), this Court underscored the "significant differences" between the attitude and understanding of university students exposed to religious ideas and that of students at lower levels. The Court stated:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines.

Id. at 686.

Indeed, this Court explictly rejected the reasoning relied upon by the court below in holding in *Mergens* that the Equal Access Act, 20 U.S.C. §§ 4071-4074, does not violate the Establishment Clause. There, school authorities contended that "because the student religious meetings are held under school aegis" and because of complusory school attendance laws, "an objective observer in the position of a secondary school student will perceive official school support for such religious meetings." *Mergens*, 496 U.S. at 249. Distinguishing such a case from one involving "impressionable children," this Court held:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

> . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

Id. at 250.[4]

Indeed, the very reasons this Court has historically championed the free exercise rights of students also explain why state-sponsored indoctrination would not result or be perceived by funding the publication of *Wide Awake*. The University environs are the " 'marketplace of ideas' " (*Healy*, 408 U.S. at 180 (quoting *Keyishian*, 385 U.S. at 603)), which bespeaks "this Nation's dedication to safeguarding academic freedom" (*id.* at 180-81). At times, this academic freedom may very well lead students, as "adults who are members of the college or university community," to express "values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated." *Id.* at 197 (Douglas, J., concurring). For these reasons, "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750 (1976).

In numerous Establishment Clause cases, the Justices of this Court have reaffirmed that the maturity of college-age students "may affect the constitutional analysis of a particular public school policy." *Edwards*, 482 U.S. at 607 n.7 (Powell, J., concurring); *see also Bowen v.*

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[4] In fact, this Court observed that Congress itself rejected the argument "that high school students are likely to confuse an equal access policy with state sponsorship of religion," a legislative judgment based in part on empirical determinations. *Mergens*, 496 U.S. at 250. Harkening back to *Widmar*, Justice Marshall stated that, in a university setting at which "a school emphasizes the autonomy of its students, . . . there is a corresponding decrease in the likelihood that student speech will be regarded as school speech." *Id.* at 267 (Marshall, J., concurring).

Kendrick, 487 U.S. 589, 638 (1988) (Blackmun, J., dissenting) (stating that college students are "less impressionable and less susceptible to religious indoctrination"); *Bender v. Willamsport Area Sch. Dist.,* 475 U.S. 534, 556 (1986) (Powell, J., dissenting) (noting that college students can discern that a university's policy is one of neutrality towards religion); *Kramer v. Union Free Sch. Dist.,* 395 U.S. 621, 637 (1969) (Stewart, J., dissenting) ("[S]ome college students under 21 may be both better informed and more passionately interested in political affairs than many adults.").

The court of appeals below ignored these important distinctions and erroneously assumed that any involvement by the University in providing benefits to an avowedly religious organization on an equal footing with all others would automatically be perceived as state sponsorship of religion. The court below therefore erred in attributing to colleges and universities "the particular concerns that arise [with Establishment Clause cases] in the context of public elementary and secondary schools." *Edwards,* 482 U.S. at 585. Failing to take cognizance of the University setting, the court of appeals improperly treated University students like "impressionable" youths, subject to the authority and coercive power of mandatory atttendance. *Id.* at 584.

CONCLUSION

For the foregoing reasons, *amicus* ISI urges this Court to reverse the judgment below.

Respectfully submitted,

ROBERT M. RADER
Counsel of Record
DONN C. MEINDERTSMA
KAREN L. GRUBBER

WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700

Counsel for Amicus Curiae
Intercollegiate Studies
Institute

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IN THE

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE,* IN SUPPORT OF NEITHER PARTY

S. Mark Goodman*
Michael Hiestand
Student Press Law Center
1101 Wilson Blvd., Suite 1910
Arlington, Virginia 22209
(703) 807-1904

*Counsel of Record

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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BRIEF OF STUDENT PRESS LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Student Press Law Center ("SPLC") is a national, not-for-profit, incorporated, legal research, information and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free press rights. Since its

founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on freedom of expression, freedom of information and other media-related legal issues of interest to the student press and has produced numerous publications on these topics. Among those issues is the effort by school officials and student governments at public colleges and universities to censor the college press through the denial of student activities fees. As the only national organization devoted exclusively to student press freedom, the Center acts as source of free information for student journalists, and in 1993, for example, provided assistance to over 1,900 student journalists, their advisers and interested others. The SPLC has submitted numerous *amicus curiae* briefs, including a brief before this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Because the ruling the Court reaches in this case will have an impact on thousands of college student publications around the nation, the vast majority of whom receive some student activity funding from their school, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the facts of the case as presented by the Court of Appeals in its decision.

SUMMARY OF ARGUMENT

In this case, the Court is confronted with two important questions:

1) Before a public university may deny funding to a student publication based on its content, what standard does the First Amendment require that the university's actions meet?

2) Does the fact that a student publication's content is pervasively religious satisfy the requirements of that standard because of the Establishment Clause of the First Amendment?

Amicus offers no discussion or analysis of the second question presented above; we leave that issue to be debated by the parties and other *amici*. Instead we focus solely on the first issue: defining the standard a public university must meet before its content-based denial of funding to a student publication will satisfy constitutional requirements. We urge the Court to affirm the Court of Appeals' holding that "[i]n order to justify differential treatment of funding eligibility based on the content of the speech involved, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 281 (4th Cir. 1994)(citing *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

ARGUMENT

As petitioners readily admit, there is no automatic right to student activity fee funding from the university for support of student expression. A government decision to deny funding for expressive activity does not necessarily implicate the free speech and free press protections of the First Amendment. For example, a university could refuse to fund a publication because it is not produced primarily by students or has a record of financial mismanagement. But when the university's decision not to fund expression is based on the content of that publication,

[1] As the Court of Appeals accepted without mention, the actions of a student government body that has been delegated authority for distributing funds by university officials are clearly attributable to the school itself. See, e.g., *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, 362, 365-366 (8th Cir. 1988); *State Board for Community Colleges v. Olson*, 687 P.2d 429, 433 n. 4 (Colo. 1984).

the university must show that its decision is consistent with First Amendment free expression guarantees.

In this case, the parties agree that the content of *Wide Awake* is the sole reason for the university's determination that it is ineligible for funding. *Rosenberger*, 18 F.3d 269, 279 n. 25.[1] Thus the university must justify its action under the First Amendment.

The holdings of this Court leave little doubt that content-based speech restrictions come with a presumption of unconstitutionality. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time Inc.*, 468 U.S. 641, 648-49 (1984). See also, *Carey v. Brown*, 447 U.S. 455, 462-463 (1980); *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 229-230 (1987)

Despite the presumption against content-based restrictions, "governmental regulation based on subject matter has been approved in narrow circumstances." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 (1980). For example, "this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate purpose for which the property has been dedicated." *Id.*

Thus this case requires the court to determine if respondents' policy presents the "narrow circumstances" that allow some content-based regulation. In short, the Court must determine the standard by which a public university's decision to deny funding to a student publication based on content will be measured.

In other cases where denial of access to government largesse has been at issue, this Court has made clear that regulations that punish based on the "viewpoint" being expressed, *Rust v. Sullivan*, 500 U.S. 173, 192 (1991), or "aimed at the suppression of dangerous ideas," *Regan v. Taxation With Representation*, 461 U.S. 540, 550 (1983), are impermissible. But this case presents a factual context that justifies additional First Amendment scrutiny. "[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)(citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 605-06 (1976)).

For more than two decades, this Court and others have noted the extraordinary importance of free expression and free press protections on the public college and university campus. "The college classroom and its environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1971). "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protection should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is no where more vital than in the community of American schools." *Id. Accord*, *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 671 (1973).[2] "The university setting of college-age

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[2]The Court has distinguished the protections of the First Amendment at public secondary schools, where students' rights "are not automatically coextensive with the rights of adults in other settings." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(quoting *Bethel School District v. Fraser*, 478 U.S. 675, 682 (1986)). Students' First Amendment rights "on college campuses *are* coextensive with those in the community at large." *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973)(citing *Healy*)(emphasis

students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas, so the underlying assumption that there is positive social value in an open forum seems particularly appropriate." *Antonelli v. Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970).

Courts around the nation have consistently held that the First Amendment does not allow a public college or university to take adverse action against a school-sponsored student publication, including the withdrawal or reduction of funding, because school officials disapprove of its content. *See, e.g., Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973)(withdrawal of funding for college newspaper because of its support for segregation); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc with modification*, 489 F.2d 225 (5th Cir. 1973)(per curiam), *cert. denied*, 416 U.S. 995 (1974)(refusal to publish student literary magazine because of "earthy" language in stories regarding interracial love and Black pride); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983)(change in method of funding of student newspaper because of publication of "offensive" humor issue); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970)(demand that student newspaper be submitted to faculty advisory board for pre-publication review because of publication of column by radical activist); *State Board for Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984)(cut of funding for student newspaper based on editorial content).[3] "Censorship of constitutionally-protected expression cannot be imposed at a

added). "Few college students are minors, and colleges are traditionally places of virtually unlimited free expression." *Bystrom v. Fridley High School*, 822 F.2d 747, 750 (8th Cir. 1987).

[3]*See also Sinn v. Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973).

college or university by suspending editors of student newspapers, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on an institution's power of the purse." *Joyner*, 477 F.2d at 460 (footnotes omitted).

The standard enumerated by the Court of Appeals in the case at bar reflects a recognition of the important role the First Amendment plays in a public university setting. "In order to justify differential treatment of funding eligibility based on the content of the speech involved, 'The State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Rosenberger*, 18 F.3d at 281 (citing *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The Eighth Circuit Court of Appeals has followed the same standard in evaluating a denial of student activity funding on a university campus. "Content-based discrimination can be justified only if the government demonstrates that its regulation is narrowly drawn and is necessary to effectuate a compelling state interest." *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988)(citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1980).[4]

These courts have correctly articulated the standard for determining the First Amendment free speech and free press

[4]Neither the Court of Appeals in this case, nor the Eighth Circuit in *Gay and Lesbian Students Association v. Gohn* relied on public forum analysis, which more aptly applies to questions of access to government property, to determine the applicability of this standard. However, if the Court were to apply forum analysis, the particular importance of free expression on a university campus would indicate that a decision to fund such a wide variety of student activites, including 15 student publications, *Rosenberger*, 18 F.3d at 271, reflected a clear intent to creat a designated public forum for expression by students that would be governed by the same First Amendment standard followed by the Court of Appeals.

protections to which petitioners are entitled. For the forgoing reasons, the judgment of that portion of the Court of Appeals' decision should be affirmed.

Respectfully submitted,

S. Mark Goodman*
Michael Hiestand
Student Press Law Center
1101 Wilson Blvd.
Suite 1910
Arlington, VA 22209
(703) 807-1904

Counsel for Amicus Curiae

*Counsel of Record

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In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF GOVERNOR GEORGE F. ALLEN AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONERS

*James S. Gilmore, III
Attorney General

David E. Anderson
Chief Deputy Attorney General

William Henry Hurd
Deputy Attorney General

Alison Paige Landry
Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PERMISSION TO FILE BRIEF AS AMICI CURIAE

Governor George F. Allen and the Commonwealth of Virginia file this brief as *amici curiae* on behalf of the Petitioners, pursuant to Rule 37.5 and that certain letter lodged with the Court, dated December 6, 1994, by which counsel for the parties evidenced their joint, blanket consent to the filing of briefs by *amici curiae* in this case.

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INTERESTS OF AMICI CURIAE

Governor George F. Allen and the Commonwealth of Virginia (collectively, "the Commonwealth")[1] are deeply

[1] These *amici curiae* are represented by the Attorney General of Virginia, James S. Gilmore, III, and his assistants designated herein. The Rector and Visitors, et al., are represented by James J. Mingle, a Special Assistant Attorney General and General Counsel to the University, and John C. Jefferies, Jr., Professor at the School of Law. This arrangement of counsel for

mindful of the efforts of our ancestors in securing for us freedom of speech, freedom of the press and freedom of worship. It is of great concern that the University of Virginia, an institution founded by Thomas Jefferson, has been shown to have a policy of funding student publications that discriminates against students wishing to espouse religious viewpoints and that may have the practical effect of suppressing such views. The Commonwealth's concern is particularly acute because the University is a state-supported institution of higher learning with a Board of Visitors appointed by the Governor. This brief is filed by these *amici*, in support of the Petitioners, in the interest of vindicating the liberties of these students, and any others who may be subject to similar discrimination. It is also filed in the interest of establishing a clear rule of law that would remove any possible confusion about what the Constitution requires of the University of Virginia and other state-supported institutions of higher learning. And it is filed to vindicate the original intention of the University's founder that it function as a forum for the free and unfettered exchange of ideas and the pursuit of knowledge.

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different parties within state government is expressly authorized by Va. Code § 2.1-121, "The Attorney General, in his discretion, may represent personally or through one or more of his assistants any number of state departments, institutions . . . entities [or] officials . . . which are parties to the same transaction or which are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution . . . or entity."

SUMMARY OF ARGUMENT

When Thomas Jefferson departed this life on July 4, 1826, he left behind instructions for this inscription to be placed on his gravestone:

HERE WAS BURIED
THOMAS JEFFERSON
AUTHOR OF THE DECLARATION OF
AMERICAN INDEPENDENCE,
OF THE STATUTE OF VIRGINIA
FOR RELIGIOUS FREEDOM, AND
FATHER OF THE UNIVERSITY OF VIRGINIA

12 Paul L. Ford, *The Works of Thomas Jefferson* at 483 (1905).

This epitaph is remarkable in that Mr. Jefferson esteemed these accomplishments more highly than his service as Governor of Virginia, or his two terms as President of the United States, achievements he chose not to mention. Now, more than a century and a half later, two of his most cherished accomplishments are intermeshed in a landmark controversy before this Court. What this case is about, in large measure, is whether Mr. Jefferson's University must abandon its commitment to free inquiry in order to abide by the principles embodied in his Statute for Religious Freedom and, later, in the First Amendment.[2]

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[2] "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947).

There is no doubt that the University has a perfect right not to aid *any* student newspapers. It may, if it so chooses, withhold its resources and leave its students free to publish or not, depending on their ability to find a press or raise funds by other means. The University has chosen not to follow this course. Instead, it has elected to devote a small portion of its resources to the printing of student publications. What is at issue here is whether, having made this choice, the University may refuse to print a particular student newspaper because it deems the students' views to be excessively religious.

The Discriminatory Policy Of The Rector And Visitors Is Presumptively Unconstitutional.

The Rector and Visitors argue that, under the Constitution, the University not only may – but that it must – refuse to give funding for printing the religious views of *Wide Awake*. The Commonwealth contends that such discrimination is *not* required by the Constitution – indeed, that it is forbidden – and that it distorts the ideal of free inquiry and open debate to which the University was dedicated by its founder.

The Fourth Circuit Court of Appeals ultimately ruled in favor of the Rector and Visitors, but it did not agree with them on every point. The Court began by flatly *rejecting* the Rector and Visitors' suggestion that they be given "unlimited discretion" to determine the eligibility of student groups for funding. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 280 (4th Cir. 1994). Instead, the Fourth Circuit found that the "publication of

religious speech in *Wide Awake* falls within the protective ambit of the Speech and Press Clause." *Id.* The Court concluded that the current discriminatory policy is "presumptively unconstitutional" (*Id.* at 287) and would not be allowed to stand unless the University could show it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 281. Up to this point, the Commonwealth has no disagreement with the Fourth Circuit and need not belabor the rationale supporting this part of the decision below.

Where the Fourth Circuit erred is in its conclusion that funding *Wide Awake*, even under a content-neutral policy, would violate the Establishment Clause, thereby necessitating the policy of discrimination. The Commonwealth believes that the Fourth Circuit egregiously misapplied the three-prong test set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[3] This case may present an opportunity for the Court to follow the recent suggestions of several Justices and reconsider *Lemon*. Yet, as the Commonwealth will show, even under *Lemon*, the discriminatory policy of the Rector and Visitors is not necessary to avoid an Establishment Clause violation. Thus, there is no reason to curtail the protections afforded these students by the Speech and Press Clause of the First Amendment.

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[3] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. [F]inally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612 (citations omitted).

ARGUMENT

A. The University Of Virginia: A Marketplace Of Ideas.

In an 1820 letter to William Roscoe, Mr. Jefferson explained his vision for the University. In an eloquent statement, later inscribed in marble at the East entrance to the Grounds, he wrote:

> This institution will be based on the illimitable freedom of the human mind. For here, we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.

15 Lipscomb & Bergh, *The Writings of Jefferson* at 303.

The importance of avoiding an anti-religious bias at the University was very much on Thomas Jefferson's mind in November of 1822. In a letter to Dr. Thomas Cooper, he expressed his dismay that, because there was no Professorship of Divinity, some had accused the University of being "against all religion." Mr. Jefferson and his Board of Visitors sought to "silence that calumny" with a proposal to encourage *private* religious speech on the Grounds:

> [W]e suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. This fills the chasm objected to ours, as a

> defect in an institution professing to give instruction in *all* useful sciences.

12 Paul L. Ford, *The Works of Thomas Jefferson* at 272 (emphasis in original).[4]

Mr. Jefferson understood that encouraging religious voices at the University would promote not only the pursuit of truth, but would also foster a spirit of toleration, particularly in those matters where truth is inherently elusive or where differences in opinion are rooted in profoundly different personal or historical experiences. In his letter to Dr. Cooper, Mr. Jefferson wrote:

> [B]y bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.

12 Paul L. Ford, *The Works of Thomas Jefferson* at 272.

The need to "neutralize prejudices" is not limited to competing religious groups, but carries over to differences between religious and secular viewpoints. For example, a conservative-minded student from a small rural community may not be persuaded to espouse the agenda of the various social activists she is likely to

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[4] The plan outlined in Mr. Jefferson's letter to Dr. Cooper was incorporated into regulations adopted by the Board of Visitors in 1824. Those regulations provided in part, that "The students of such religious school, if they attend any school of the University, shall be considered as students of the University, subject to the same regulations, and *entitled to the same rights and privileges.*" Saul K. Padover, *The Complete Jefferson* at 1110 (emphasis added).

encounter at the University,[5] but she may very well come to understand that the issues confronting our society are more complex than she previously perceived. Similarly, the radical who reads *Wide Awake's* particular religious perspective may not change his goals, but he may come to understand that traditional social values are rooted in intellectually deeper ground than he previously supposed.

A devout Christian student is unlikely to convert to Islam upon reading *Al Salam*, a newspaper published by the University-funded Muslim Student Association.[6] Yet, to learn from the pages of that publication that Muslims recognize a line of prophets that includes Abraham and Moses, as well as Jesus, may very well help that student escape the antagonism that has divided these faiths from the time of the Crusades. The Jewish Law Student Association ("JLSA") also receives University funds. Although it has no publication, it includes non-Jews in its activities, including its Seders,[7] thereby cultivating a deeper respect for its ancient faith. As for *Wide Awake*, the confirmed

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[5] Groups funded by the University include Students for Animal Rights, Lesbian and Gay Student Union, Post-Conviction Project and Gandhi Peace Center. J.A. at 65.

[6] The Rector and Visitors contend that the Muslim and Jewish groups that it funds are not religious, but cultural, a ephemeral distinction discussed in more detail in Part D.

[7] The Seder is a ceremonial dinner commemorating the Exodus, held on the eve of the first day of Passover, pursuant to the injunction found in the Torah at Exodus 12:42 and Leviticus 23:4-6. Even if no University funds are spent directly on these celebrations, the use of University funds by JLSA for other organizational purposes contributes, if only indirectly, to the success of these religious events.

agnostic may not be led to a life of faith through the reading of *Wide Awake*, but he may come to appreciate why many committed Christians – from both the liberal and conservative branches of their faith – champion their respective causes in the public life of our country. A marketplace in which religious ideas are granted access equal to that afforded secular groups contributes to a spirit of toleration. In a diverse democratic society, such toleration is a virtue upon which civil peace – and hence our future as a nation – may well depend.

Mr. Jefferson's overarching vision for the University describes what has come to be known, in modern parlance, as a "marketplace of ideas." It is not an idea limited to Charlottesville, Virginia, but is a concept recognized by this Court as a vital part of higher education throughout the United States:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion of Chief Justice Warren).

The Jeffersonian ideal was again embraced by this Court in *Healy v. James*, 408 U.S. 169 (1972), when it said:

> The college classroom *with its surrounding environs* is peculiarly the "marketplace of ideas," and we break no new constitutional ground in

> reaffirming this Nation's dedication to safeguarding academic freedom.

408 U.S. at 180-181 (emphasis added).

Thus, it is not just the classroom where the marketplace of ideas is to be found, but wherever and however students seek out the views of others or seek to express their own. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, 112 S. Ct. 2701, 2705, 120 L. Ed. 2d 541, 549-550 (1992); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45-46 (1983) (the forum includes both the physical situs and "intangible channels of communication"). Indeed, the marketplace of ideas is found throughout the University community, or what Mr. Jefferson called the "academical village."

Establishing a marketplace of ideas within the University community plainly serves a legitimate secular purpose. This marketplace is enhanced when the University helps students meet their printing costs, and thus enables them to publish their ideas to the rest of the academic community.[8] Few would doubt that such enhancement occurs when the University gives aid to students wishing to publish secular ideas, or even anti-religious ones. Yet, if this is true, then the marketplace must also be enhanced when similar aid is given to students wishing

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[8] The Student Activity Fee Statement of Purpose and Funding Guidelines provides, in part: "The Rector and Visitors have determined that activities of the student organizations in the following categories relate to the educational purpose of the University and thus are eligible for funding . . . [4] student news, information, opinion, entertainment, or academic communications media groups." Plaintiffs' Ex. 3, Fourth Circuit App. at 74.

to express *religious* viewpoints. To hold otherwise is to presume that religious ideas are inherently inferior,[9] a prejudice that our jurisprudence and our history emphatically reject. "The Establishment Clause does not demand hostility to religion, religious ideas, religious people or religious schools." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, ___ U.S. ___, 114 S. Ct. 2481, 2498, 129 L. Ed. 2d 546, 570 (1994) (O'Connor, J., concurring). Indeed, as this Court has noted, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *See also Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Still, some may argue that there cannot be a *secular* purpose for aiding *religious* speech; but such an argument ignores the broad array of purposes that this Court has approved under the rubric of "secular." For example, in explaining its earlier decision to uphold tax exemptions for religious groups along with other non-profit organizations, this Court approved the view that religious groups advance such "secular objectives" as "contribut[ing] to

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[9] In an interview recently granted to the *Denver Post*, Tanisha Sullivan, a third year student at the University of Virginia, who makes decisions regarding the expenditure of student activity funds, explained how Christianity is viewed at the University of Virginia. "It raises an eye brow and you look at it a little more closely just because it is Christianity. Everyone is so on edge when it comes to Christianity. . . . My generation is taking a turn away from Christianity and trying to explore other things, trying to break away from the norm. When you have people like the Bakers and Jerry Falwell, my generation sees Christianity as money-grubbing, sort of a farce." James Gannon, "Christian Magazine Denied Funds." *Denver Post* (Nov. 8, 1994) at 5F.

the cultural and moral improvement of the community . . . *and enhanc[ing] a desirable pluralism of viewpoint. . . .*" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (emphasis added) (discussing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970)). Helping the students of *Wide Awake* meet their printing costs would likewise enhance a desirable pluralism of viewpoint, and thereby advance a legitimate secular objective.

By encouraging secular and anti-religious voices, but not religious ones, the Rector and Visitors place limits on the "illimitable freedom of the human mind." Students are no longer encouraged to "follow truth *wherever* it may lead," but are discouraged from pursuing those paths that lead toward a Supreme Being. In short, the marketplace of ideas is distorted.

In trying to acquit the University from the charge that it inhibits religion, the Fourth Circuit said:

> The University's policy of allowing the members of Wide Awake Productions open access to campus facilities accords the plaintiffs ample opportunity to express their religious views, and leaves the University community as a whole free to read and consider them.

18 F.3d at 285.

The absence of actual suppression is not, however, the full measure of the University's constitutional obligations. In determining whether religious expression is inhibited, it is necessary to look at the rights granted to other students who espouse viewpoints with which *Wide Awake* must compete in the marketplace. All groups are apparently granted access to the same University-owned

equipment in preparing the content of their respective publications. But, while the Rector and Visitors then give fifteen other groups access to printing presses, by paying the printers' bills, they leave the students of *Wide Awake* to fend for themselves. Thus, while groups expressing secular or anti-religious views are free to write, edit and publish articles for their next issues, the students of *Wide Awake* must spend their time scrambling for money with which to pay the printer and keep their publication alive. Such a discriminatory policy inhibits the expression of religious viewpoints by leaving *Wide Awake* at a competitive disadvantage in the marketplace of ideas. In *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984), Justice O'Connor stated that government endorsement in violation of the Establishment Clause occurs when government sends a message to "nonadherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." In this case, the students espousing secular views are treated by the University as insiders, while students espousing religious viewpoints are treated as though they are not full members of the University community. Moreover, on an individual level, the current funding policy sends the message to aspiring student writers that, if they want the University to help print their work, they had better steer clear of religious advocacy and write about something the Rector and Visitors find more palatable.

Mr. Jefferson's plan for the University not to intrude upon the independence of religious groups, but to provide them every accommodation (*see supra* page 6) anticipated by 159 years the decision of this Court in *Widmar v.*

Vincent, 454 U.S. 263 (1981). There the Court required the University of Missouri to allow religious groups access to the same campus meeting rooms made available for other student groups. One reason for the decision was the need to guard against an anti-religious distortion of the marketplace of ideas, a concern implicit in the concurring opinion of Justice Stevens:

> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.

Id. at 281.

Like the policy rejected in *Widmar*, the policy now in effect at the University of Virginia would allow young hedonists access to University resources for printing articles advocating an amoral lifestyle, and would permit student atheists similar assistance for publishing anti-religious diatribes. If the Student Activity Fee ("SAF") can be used for such ends, then students desiring to extol the virtues of a Christian lifestyle, or to comment favorably on the writings of St. Augustine, should not be barred from receiving comparable assistance. Mr. Jefferson and his original Board of Visitors wished to encourage such private religious speech by every

accommodation they could give them. The current Rector and Visitors should follow their example.

B. A Content-Neutral Policy Neither Advances Nor Inhibits Religion.

The central flaw in the argument of the Rector and Visitors is their claim that funding *Wide Awake* would have the primary effect of advancing religion, in violation of the second prong of the *Lemon* test. They reach this mistaken result because they focus on whether the funding of *Wide Awake, considered in isolation,* would have such an impermissible effect. But, as this Court has recognized, "[To] focus exclusively on the religious component of *any* activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). Instead, the test is whether funding *Wide Awake, under a content-neutral policy*, would have the primary effect of advancing or inhibiting religion. Rather than examine whether such a policy would have "the practical effect of aiding religion *in this particular case*," the Court must "look[ ] to the nature and consequences of the program *viewed as a whole.*" *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring) (emphasis in original).

A mistaken focus similar to that still exhibited by the Rector and Visitors was corrected by this Court more than a decade ago in *Widmar*. The University of Missouri argued that allowing religious groups to share in the use of those facilities, particularly for the purpose of worship,

would have the primary effect of advancing religion. This Court disagreed, and put the matter in proper perspective:

> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

Widmar, 454 U.S. at 273 (internal citations omitted).

To paraphrase *Widmar*, the Rector and Visitors likewise misconceive the nature of the case. The question is not whether funding *Wide Awake* would violate the Establishment Clause. The University has made its resources available for printing the publications of student groups, and the question is whether it can now exclude certain groups because of the content of their publications. In this context, it cannot be said that the primary effect of a funding policy, open to all forms of printed discourse, would be to advance religion.

In adopting the position of the Rector and Visitors, the Fourth Circuit said "it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship – and therefore advancement – of religious belief." 18 F.3d at 285. This bold assertion fundamentally

misperceives the nature of state sponsorship in a university setting. Again, *Widmar* supplies the correct perspective:

> [A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . [S]uch a policy would no more commit the University . . . to religious goals than it is now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.

Widmar, 454 U.S. at 274 (internal quotation marks and citations omitted). Similarly, a content-neutral funding policy would no more commit the University of Virginia to the religious views of *Wide Awake* than it is now committed to the views of any of the assorted and sometimes controversial groups already receiving funds.

The Court in *Widmar* also made the point that: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. There is no reason to believe that students at the University of Virginia are any more impressionable or any less astute than students at the University of Missouri. They, too, would know that enabling the students of *Wide Awake* to print their views, under a content-neutral policy, would not represent an official endorsement of those views.

The Rector and Visitors' fear of an apparent endorsement is even more unreasonable in light of the emphatic disclaimer they *already* require from all student groups, including *Wide Awake*. In order to obtain *any* benefits

from the University, including the use of meeting rooms and office space, a student organization must execute a University-drafted contract containing the following declaration:

> The University is . . . willing to provide certain benefits . . . , but those benefits should not be misinterpreted as meaning . . . that the University approves of the organizations' goals or activities.

J.A. at 26.

The contract also requires the student group to include the following statement (or another similar statement approved in advance by the University) in the group's letters, contracts, publications and other such written materials:

> "Although this organization has members who are [University] students . . . , the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions."

J.A. at 28.

In keeping with this obligation, the funded student groups print a disclaimer on their publications. *Wide Awake* prints the required disclaimer, too. Since these narrowly-tailored steps are apparently sufficient for the Rector and Visitors to rest easily about the publications they already fund, they should not lose any sleep over *Wide Awake*, either.

It is also important to note, as an empirical matter, that the benefits at issue here are available to a very broad class of secular groups. In *Widmar*, the Court noted

that there were over 100 recognized student groups at the University of Missouri, and said: "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274 (citations omitted). Similarly, there are more than 300 recognized student groups at the University of Virginia, including more than 100 groups that receive funding and about 17 religious ones that do not. Also significant are the 15 non-religious publications on the Grounds that are funded by the SAF.[10] The fact that SAF monies are available to so broad a spectrum of groups confirms that a content-neutral policy would have a primarily secular effect.[11]

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[10] In addition, there is *Al Salam*, a publication of the Muslim Student Association, a group the Rector and Visitors prefer to describe as *cultural* rather than religious.

[11] *Widmar's* reliance on the distribution of benefits was not new. Repeatedly, when this Court has struck down facially-neutral state statutes to aid non-public schools, it has taken pains to note that the beneficiaries of those funding schemes were almost exclusively religious. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (96% of non-public school students attended church-related schools.) *See also Sloan v. Lemon*, 413 U.S. 825, 830 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973) (approximately 85% of the non-public schools were church affiliated, and "all or practically all" of the schools entitled to receive certain grants were related to the Roman Catholic Church and taught religious doctrine to some degree); *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) ("[O]f the 1,320 nonpublic schools . . . that . . . qualify for aid . . . , more than 75% are church-related or religiously affiliated . . . . "); *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (of 720 chartered nonpublic schools, all but 29 were sectarian, and more than 92 % of the nonpublic school students attended schools of one particular denomination).

Statistical effects lopsidedly in favor of sectarian institutions are not, however, the only distinction between the case at bar and the *Lemon* line of cases in which private school funding statutes were invalidated. In those cases, the financial benefits at issue were used to support various *doctrinally exclusive enclaves* in which particular sectarian viewpoints were taught to school children, who were "captive audiences" *isolated from competing views supported by comparable funding*. By contrast, if the University adopted a content-neutral policy for funding student publications, it would not be supporting *any* doctrinally exclusive enclave, especially since these students are adults – not impressionable children – and since no student group could maintain a monopoly position on the Grounds. Instead, such a policy would help create a University-wide marketplace of ideas in which no idea would be favored by the University over any other.[12] The only thing favored would be a level playing field in which all would be encouraged to profess and, by argument, maintain their opinions.

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[12] In another context, the University might legitimately reach the conclusion that some ideas are, as an academic matter, more worthy of support than others. What this case is about, however, is not the rigorous business of academics, but the more hurly-burly, extra-curricula world of student self-expression in which no one pretends that academic excellence is a prerequisite to participation. Moreover, even in those circumstances where the University must make academic value judgments, it is certainly not *required* by the Establishment Clause to treat religious concepts as unworthy of support or unrelated to its secular educational purpose. For example, the University may and, in fact, does maintain a Department of Religious Studies.

C. The Distinction Between Money And Facilities Is A Mirage.

Faced with the irresistible logic of *Widmar*, the Rector and Visitors have tried to construct a final defensive perimeter out of the fact that the case at bar involves the expenditure of money while *Widmar* involved a temporary use of facilities. The argument seems to be that providing benefits to religious groups is unconstitutional whenever additional dollars must be spent to confer those benefits. The argument is meritless for at least three reasons.

First, the Court in *Widmar* did not rely on a distinction between money and facilities. On the contrary, in finding no unconstitutional advancement of religion, the Court spoke in terms broad enough to encompass both kinds of resources:

> If the Establishment Clause barred the extension of *general benefits* to religious groups, "a church could not be protected by the police and fire department, or have its public sidewalk kept in repair."

Widmar, 454 U.S. at 274-275 (emphasis added) (citations omitted).

The public services cited by the Court do not come cheaply. Indeed, significant additional expenditures can be incurred in bringing a synagogue vandal to justice, extinguishing a church fire or repairing a sidewalk in front of a house of worship. Thus, the constitutionality of

printing *Wide Awake* cannot turn on whether such a benefit would involve the expenditure of additional dollars.[13]

Second, the distinction between money and facilities leads to absurd differences in results. In an affidavit filed with the trial court, the Rectors and Visitors make the point that "use of computers, printers,[14] and other special equipment . . . is open to all groups which produce a publication, including *Wide Awake*." J.A. at 74. They apparently concede that such a content-neutral policy with respect to tangible facilities – including equipment – is not only compatible with the Establishment Clause but is required under *Widmar*. Suppose, then, that the University were also to *own* the photocopiers or printing presses used by student groups to mass produce their newspapers. Even under the Rector and Visitors' limited reading of *Widmar*, the University would be *required* to make those photocopiers and printing presses available on a content-neutral basis. After all, there is no perceptible constitutional distinction between preparing the first copy of a newspaper and printing multiple copies for distribution to the student body.

Under the facts of this case, of course, the University does not offer students the use of its own photocopiers or printing presses. Instead, it simply pays the bills submitted by third parties who mass produce the student newspapers on privately-owned equipment. It is on this

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[13] This is especially true given the policy of using allocated SAF monies to pay vendors, rather than paying the funds to the student groups directly.

[14] These "printers" are apparently computer printers, not printing presses.

gossamer distinction – the difference between *owning* the presses and *hiring* them – that the Rector and Visitors apparently seek to hang their case, and transform a content-neutral policy that is constitutionally *required* into one that is constitutionally *forbidden*. It is a perilous place from which to hang. The distinction has absolutely no relevance to the fundamental purposes underlying the Free Speech and Establishment Clauses.

Third, in the context of a university, the fact that students are obligated to pay the funds in question does not condemn a content-neutral policy of disbursement. In his Statute for Religious Freedom, Mr. Jefferson stated that "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . . " Va. Code § 57-1. Nevertheless, "our nation's universities preserve a long-standing tradition of tolerating and even encouraging the propagation of all sorts of disbelieved opinion,"[15] *Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 300, 121 L. Ed. 2d 224 (1992) (resolving the question of how to reconcile Mr. Jefferson's non-compulsion principle with the need to foster a marketplace of ideas.) Of course, student activities fees are *already* being used to fund the expression by some students of secular and anti-religious opinion with which other students strongly disagree. One solution may be to de-fund all expressions of student opinion, but this is not the only

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[15] Moreover, student activity fees are no more compulsory that the tuition that students pay; both are contractual obligations voluntarily undertaken by students when they accept offers of admission to the University.

solution the Constitution permits. In the context of a university community, where the marketplace of ideas is of paramount importance, using student fees for student publications, if carried out in a content-neutral manner, does not support the *propagation* – or sponsorship – of ideas, but rather the *exchange* of ideas. Of course, exchange may degenerate into *de facto* sponsorship if some students are excluded from funding because of the content of their ideas. Indeed, this is precisely the unconstitutional condition the Commonwealth seeks to correct and which the Rector and Visitors have created by their current discriminatory policy.

D. A Content-Neutral Policy Avoids Entanglement; Discrimination Creates It.

Under the third prong of *Lemon*, a government policy touching upon religion must avoid excessive entanglement with religion. In explaining why it thought that funding of *Wide Awake* would lead to such entanglement, the Fourth Circuit largely repeated its assumption that such support would constitute government endorsement. 18 F.3d at 286. As the Commonwealth has shown, this assumption is false. *See* Part B. Moreover, given the SAF payment system, by which funds are not given directly to students groups, but are paid to third party vendors upon the presentation of invoices, there is no danger of the kind of entangling "state inspection" and "surveillance" that concerned this Court in *Lemon*. *See* 403 U.S. at 620. In short, the content-neutral funding policy sought by the Commonwealth carries little or no risk of entanglement.

On the other hand, the discriminatory policy of the Rector and Visitors has already entangled the University in a series of highly arbitrary and potentially divisive decisions that no agency of government has any business making. In *Widmar*, this Court made the following observation about the University of Missouri:

> [T]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11.

This prediction has been borne out at the University of Virginia by the history of its dealings with the Muslim Student Union ("MSA") and a gospel choir known as "Black Voices." While *Wide Awake*, a Christian publication, has been denied funding on the theory that it is religious, the Muslim group has been granted funding on the theory that it is a "cultural" organization. According to the Rector and Visitors, an organization is "cultural" if it is "primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art and/or tastes." J.A. at 90. Culture and religion are, of course, not mutually exclusive. Indeed, religious belief can be the dominant feature of a cultural tradition. As Justice Robert Jackson observed in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 236

(1948), "nearly everything in our culture worth transmitting, everything that gives meaning to life, is saturated with religious influences."

The central if not the only unifying tradition of Muslim culture(s) is its belief in Islam.[16] This seems to make the MSA a *religious* organization, especially since its stated purpose is "to aid Muslim students during their stay at the University and to *promote a better understanding of Islam to the University community.*"[17] J.A. at 92. (Emphasis added). This statement is strikingly similar to the purposes of *Wide Awake* as stated in its constitution: (1) "publish[ing] a magazine of philosophical and religious expression"; (2) *"facilitat[ing] discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"*; and (3) provid[ing] a unifying focus for Christians of multicultural backgrounds." J.A. at 67. (Emphasis added). By what theory of the Constitution do the Rectors and Visitors presume to aid Muslims in

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[16] Islam is a world religion whose affirmation and creed is summarized in the Shahadah: "There is no God but Allah and Mohammed is His prophet." *See Concise Encyclopedia of Islam* 359 (Cyril Glassé Harper and Row Publishers, Inc., San Francisco 1989). Islam is composed of different sects and spans many diverse cultures, including the cultures of Bosnia, Turkey, the Arab states, Iran, Pakistan, Bangladesh, the Philippines, China and downtown Detroit. It makes no more sense to speak of a single Muslim culture than to speak of a single Christian culture, given the diversity, say, between a Parisian Catholic and an Amazon Indian baptized by Methodist missionaries.

[17] One MSA activity, cited by its President as an example of its work, was to sponsor a speaker on the *Western Misconceptions About Islam*, while another MSA activity is to publish its newspaper, *Al Salam*.

explaining their faith to the University community, while denying such aid to Christians who wish to explain theirs? Do the Rector and Visitors believe that Christianity, being a faith more familiar to these shores, is already well-enough understood? It is not government's business to make such judgments.

The University's present entanglement with religion is further shown by its dealings with "Black Voices." In 1990-91, the main objective of "Black Voices" was to carry "gospel and contemporary religious music . . . into the university and residential communities." J.A. at 78. Surely, a *gospel* choir must be a religious group, but the University preferred to call it "cultural" and gave it funding. Even so, at the end of the school year, when the members of "Black Voices" began to pray at choir practice and to encourage each other to be models of faith, it then became a "religious activity" and lost its eligibility for funding. J.A. at 73, 76-77. Presumably, the Rector and Visitors would not de-fund a group simply because it said grace at its annual banquet, or de-fund the football team because it prayed before a big game; but, when does a little prayer become too much prayer? And, by what Orwellian theory of the Constitution do the Rector and Visitors purport to monitor who prays, or how long and how often?

In sum, the *de facto* policy of the Rector and Visitors seems to be a mish-mash of rules, exceptions and exceptions to the exceptions. Student publications are eligible for funding, *unless* they are excessively religious. *But*, religious expression may *still* be eligible for funding when it is undertaken by what is deemed a "racial, ethnic or affinity group," though *not* when undertaken by a

culturally cosmopolitan group. *But*, even "racial, ethnic or affinity groups" must not engage in too much prayer at their meetings, or they will risk losing funds for their public activities. Trying to make these Alice-in-Wonderland distinctions is entanglement of the worst sort. It cannot be what Mr. Jefferson had in mind when he wrote the Virginia Statute for Religious Freedom or when he founded the University of Virginia.

CONCLUSION

For the reasons given herein, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

GOVERNOR GEORGE F. ALLEN
and the
Commonwealth of Virginia
By Counsel

*JAMES S. GILMORE, III
Attorney General

DAVID E. ANDERSON
Chief Deputy Attorney General

WILLIAM HENRY HURD
Deputy Attorney General

ALISON PAIGE LANDRY
Assistant Attorney General

**Counsel of record*

900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

(15)

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In The

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RONALD W. ROSENBERGER, *et al.*,

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v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

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BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, AND ANTI-DEFAMATION LEAGUE, IN SUPPORT OF RESPONDENTS

SAMUEL RABINOVE
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

RUTH LANSNER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
DEBBIE N. KAMINER
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

STEVEN K. GREEN
(Counsel of Record)
Americans United for Separation of Church and State
1816 Jefferson Place, NW
Washington, DC 20036
(202) 466-3234

45 pp

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

This is a religious funding case. The fundamental question here is whether the University, as a governmental entity, can fund the propagation of religious speech. At its most basic level, the Establishment Clause prohibits public monies being used to promote religious doctrine. This fact alone distinguishes this case from the access cases relied on by Petitioners. The distinction between access and funding represents a sensible limiting principle for Establishment Clause adjudication.

The conflict in this case between the Establishment and Free Speech clauses is overstated. Petitioners already possess extensive access rights to the University; here they seek to participate under a separate, closed forum for funding. Finally, this Court should decline to reconsider the test enunciated in *Lemon v. Kurtzman*. The Court should continue to use *Lemon* where appropriate, but not be wedded to any one analytical standard.

ARGUMENT

I. AT A FUNDAMENTAL LEVEL, THE ESTABLISHMENT CLAUSE PROHIBITS GOVERNMENT FUNDING OF RELIGIOUS SPEECH AND EXHORTATION

A. This Court Has Never Upheld the Use of Government Funds to Pay for Religious Activity.

At its core, this is a religious funding case. The central issue is whether the University of Virginia (University) is barred by the Establishment Clause from providing funds for the propagation of Petitioners' inherently religious message.[1] Both settled case law and the principles underlying the Establishment Clause instruct that the answer be "yes."

On those points with legal significance, this case is no different from a host of earlier cases where religious entities sought to use government funds for religious purposes. *See Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In many ways, this case is easier than the majority of the Court's funding cases which involved issues of whether public monies could be used for purportedly secular activities and functions of religious organizations. *See Bowen v. Kendrick*, 487 U.S. 589 (1988); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971). Here, Petitioners are not asking to use public funds for a secular activity. Rather, they are asking the University to pay for the propagation of their religious message. A decision upholding their request would be unprecedented and would do untold damage to the purpose and meaning of the Establishment Clause.

Beginning with the earliest funding case and continuing up through the present, this Court has never allowed the direct payment of public funds for the support of religious activity. In those cases where religious entities have been permitted to participate in the public fisc, it has always been with the assurance that public monies are funding secular functions and activities only. *See Kendrick*, 487 U.S.

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[1] The religious character and purpose of *Wide Awake*, as well as the religious nature of its content, are uncontested. *See* Pet. Brief at 6-7; J.A. 7a.

at 613 (noting the secular purpose and function of services under the Adolescent Family Life Act); *Wolman*, 433 U.S. at 237-41 (noting the secular nature of textbooks and standardized tests and scoring); *Meek*, 421 U.S. at 361 (secular textbooks); *Board of Education v. Allen*, 392 U.S. 236, 245 (1968) (same); *Everson v. Board of Education*, 330 U.S. 1, 18-19 (1947) (noting the secular nature of bus transportation); *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899) (noting the nonsectarian character and function of a hospital). Conversely, this Court has prohibited the application of public monies where there has been a risk that funds would be used to pay for religious activities or functions or otherwise support the religious ministry of a recipient. *See School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985); *Aguilar v. Felton*, 473 U.S. 402, 412 (1985); *Wolman*, 433 U.S. at 236; *Meek*, 421 U.S. at 370; *PEARL v. Nyquist*, 413 U.S. 756, 783 (1973); *Lemon*, 403 U.S. at 619. The Court has adhered to this no-funding rule notwithstanding the fact that many of the cases involved neutral government programs that made funds available to both secular and religious recipients alike.

This prohibition on funding religious activities has its basis in the nature and purpose of the Establishment Clause. At its fundamental level, the Establishment Clause is designed to preclude the "sponsorship, financial support or active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The purpose of the Establishment Clause, as Justice Jackson stated, "was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." *Everson*, 330 U.S. at 26 (Jackson, J., dissenting). As Justice O'Connor stated more recently, "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Kendrick*, 487

U.S. at 623 (O'Connor, J., concurring) (emphasis in original).[2]

This distinction between allowing religious entities to participate in secular government programs and prohibiting the application of public monies for religious purposes can be seen in the Court's college funding cases.[3] In all three cases the Court allowed church-related colleges to participate in generally available public grant, loan and revenue bond programs for secular activities of the institutions. But significantly, in each case the Court found that the church-related colleges were nonsectarian in character and were prohibited under the respective statutes from using public funds for any religious purpose.[4] Based on the lack of evidence that any funds were used for religious purposes, the Court held that the church-related colleges could participate in the general funding programs. While announcing this general rule, the Court was clear as to the parameters of that rule and the precondition for religious institutions to participate under the neutral funding programs: "funds [may] not be used to support 'specifically religious activity.'" *Roemer*, 426 U.S. at 759.[5] The government cannot "pay for

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[2] The state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Everson*, 330 U.S. at 16.

[3] *Roemer*, 426 U.S. 736; *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton*, 403 U.S. 672.

[4] *Roemer*, 426 U.S. at 740, 743; *Hunt*, 413 U.S. at 736-37; *Tilton*, 403 U.S. at 675.

[5] Accordingly, in *Tilton*, the Court struck down that provision of the Higher Education Facilities Act, 20 U.S.C. § 745 (b)(2), that placed only a twenty year cap on the ability of recipient institutions to use funded facilities for sectarian instruction and religious worship. *Tilton*, 403 U.S. at 683.

what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes aid available to secular and religious institutions alike." *Id.* at 747.

The Court's more recent funding cases have adhered to this rule that the Establishment Clause prohibits the use of public funds to pay for religious activity, even when the funds are administered through neutral government programs. In *Kendrick*, the Court upheld the facial constitutionality of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z *et seq.* (1988), as well as the eligibility of religious organizations to receive funding for providing Act services. Still, the Court remanded the case back to the district court to determine whether AFLA funds were going to pervasively sectarian organizations or were being used to promote religious activities of the recipient institutions. 487 U.S. at 621-22. While some of the justices were divided over the appropriateness of using the "pervasively sectarian" formula as a shorthand for determining eligibility, the Court was unanimous in holding that the public funds could not be "used to further religion." *Id.* at 624 (Kennedy, J., concurring).[6] As the Chief Justice stated, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religious

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[6] "Here it would be relevant to determine, for example, whether the Secretary [of H.H.S.] has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." *Id.* at 621; "First, *any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring) (emphasis in original); "The risk of advancing religion at public expense . . . is much greater when the religious organization is directly engaged in pedagogy . . .." *Id.* at 641 (Blackmun, J., dissenting).

affiliated institutions does not have the primary affect of advancing religion." *Id.* at 609.

Similarly, in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), the Court found no constitutional prohibition to using funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1988), to pay for a sign language interpreter for a hearing impaired student attending a parochial school. But, consistent with the rule in *Kendrick*, the Court found no evidence that the interpreter was involved in the instructional process or that the parochial school accrued any financial benefit from the presence of the interpreter. *Id.* at 2468-69 (distinguishing earlier aid cases involving "direct grants of government aid [which] relieved sectarian schools of costs they otherwise would have borne."). Evidence that public monies would be used to further the religious program of the host parochial school would have required a different resolution of the case, notwithstanding the neutral character and general availability of IDEA funds.[7]

Unlike the above cases where both secular and religious entities used public funds to provide secular services, "religion is at the core of the subsidized activity" in this case. *Kendrick*, 487 U.S. at 641 (Blackmun, J., dissenting). The distinctly religious purpose and message of *Wide Awake* is unmistakable, from the content of its articles

[7] In fact, the regulations implementing IDEA, like numerous other federal statutes and regulations, prohibit using federal funds for any religious purpose, including religious worship, instruction, or proselytization. 34 C.F.R. § 76.532(a) (1994). *Cf.* the Hill-Burton Act, 42 U.S.C. § 291 *et seq.* (1988); the American Schools and Hospitals Abroad Program, 22 U.S.C. § 2174 (1988); the Emergency Shelter Grants Program, 42 U.S.C. §§ 11371-11378 (1988 and Supp. 1994); and the Child Care and Development Block Grant of 1990, 42 U.S.C. § 9858 (Supp. 1992).

and editorials to the stated goal contained in its opening editorial. J.A. 45-46. Had Petitioners applied for University funding for secular activities or functions, then the Establishment Clause would not bar them from receiving the generally available benefit. But here Petitioners are seeking funding for a distinctly religious purpose: the publication of a religious magazine.[8] Such direct funding of religious activity is expressly prohibited under Establishment Clause jurisprudence. As the Court stated in *Grand Rapids*:

> Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religion.

473 U.S. at 385; *accord Kendrick*, 487 U.S. at 611. Here the court of appeals correctly ruled that the Establishment Clause bars such government-financed indoctrination of the Petitioners' beliefs.

B. The Court Has Never Held That the Breadth of a Recipient Class Satisfies Establishment Clause Prohibitions on the Use of Public Funds for Religious Purposes.

[8] Accordingly, *amici* believe that the University funding of two arguably religious organizations, the Jewish Law Student Association and the Muslim Students Association raise similar Establishment Clause concerns. As Petitioners argue, the current application of the University guidelines may result in discrimination among religions. Pet. Brief at 19-20. No religious activity or, for that matter, no clearly antireligious activity should be paid for with University fees. *See Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring). The appropriate remedy, however, is for the Court to affirm the decision of the court of appeals that funding of *Wide Awake* is prohibited by the Establishment Clause, with instructions that the funding of any predominantly religious or antireligious activity is equally prohibited.

Petitioners assert that the Establishment Clause does not bar religious entities from participating in public benefits on an equal and nondiscriminatory basis and from applying those benefits toward a religious purpose. Pet. Brief at 22-43. Petitioners are half right. As stated above, the Establishment Clause allows religious organizations and entities to participate in neutral government programs and to apply those benefits toward secular activities and functions. *Kendrick*, *supra*. But the clause prohibits applying those same neutral benefits toward religious purposes, notwithstanding the size or breadth of the recipient class.[9]

Contrary to Petitioners' claims, this Court has never held that the breadth of the recipient class of a neutral government program resolves all Establishment Clause concerns as to how one recipient spends the funds. Pet. Brief at 30-36. In fact, many of the above-cited cases (where the Court struck down using neutral funds for religious purposes) involved government programs that were generally available to a spectrum of recipients irrespective of their public-nonpublic or secular-religious nature. In *Meek*, the Court struck down the provision of a Pennsylvania law that sought to extend to parochial schools instructional materials and equipment that were being made available to public schools. 421 U.S. at 351-52, 363. While noting that the state could provide secular and nonideological services to parochial schools provided they were unrelated to a religious function, the Court held that the state could not provide assistance that would inadvertently foster religion. *Id.* at 370-71; *accord Wolman*, 433 U.S. at 246. Similarly, *Roemer*, *Hunt*, and

[9] "[V]irtually everyone acknowledges that the [Establishment] Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation." *Lee v. Weisman*, 112 S. Ct. 2649, 2672 (1992) (Souter, J., concurring).

Tilton all involved large funding programs that were available to public, private secular, and church-related colleges alike. 426 U.S. at 740, 743; 413 U.S. 734, 741-42 (1973); 403 U.S. at 676-77. Moreover, the funds involved could be used for "a wide variety" of educational projects. *Tilton*, 403 U.S. at 675.[10] But neither the breadth of the recipient class nor the neutral purpose of the grants affected the constitutional ban on using the grant monies for religious purposes.[11] In fact, in *Tilton*, the Court reversed that portion of the Act that permitted publicly financed buildings to be used for religious purposes after twenty years, notwithstanding the breadth of the HEFA. *Id.* at 683.

Petitioners' argument that the Court's early aid cases — *Bradfield*, *Everson*, and *Allen* — support allowing religious groups to participate in broad, neutral programs ignores the fact that in none of those cases were funds used to support religious activities or the religious ministry of the host institutions. *See* Part I A, *supra*. Had the breadth of the recipient class been determinative in those cases, then the Court's discussion of the secular uses of the funds would have been superfluous. Instead, those decisions are consistent with the post-*Lemon* line of cases prohibiting public finding for religious activity but allowing religious institutions to receive funding for secular services. Thus the

[10] In fact, *Roemer* involved noncategorical grants, "subject only to the restrictions that the funds not be used for 'sectarian purposes.'" 426 U.S. at 739.

[11] In *Roemer*, only five of seventeen private colleges were church-related. 426 U.S. at 743. In *Hunt*, revenue bonds under the state Educational Facilities Authority were available to all institutions of higher education, public and private alike. 413 U.S. at 736. While no numbers are provided in *Tilton*, theoretically all of the nation's colleges and universities, excluding sectarian institutions, were eligible for HEFA grant monies.

Court's statements that "religious institutions need not be quarantined from public benefits that are neutrally available to all," *Roemer*, 426 U.S. at 746, must be read within the context of the Establishment Clause's prohibitions on funding religious activity.[12]

The controlling authority on this question, and the bane of Petitioners' argument, is the holding in *Bowen v. Kendrick*. Under AFLA, a wide spectrum of public and private organizations are eligible to receive funding to provide a range of family planning counseling services including pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, and general educational services relating to adolescent premarital sexuality.[13] Although participation by religious organizations is expressly provided for in the statute, religious organizations are not the predominant recipients of AFLA monies. 487 U.S. at 608, 610 n.12. Nevertheless, notwithstanding the breadth of the recipient class and the range of funded services, the Court found that AFLA monies cannot go to fund pervasively

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[12] Petitioners' reliance on language found in Justice Harlen's concurrence in *Walz v. Tax Commission*, 397 U.S. at 697, is similarly unavailing. Pet. Brief at 31. While the majority noted that houses of worship fit within a "broad class" of exemptees from property taxes, it also held that "a direct money subsidy would be pregnant with involvement . . .." 397 U.S. at 673, 675. As Justice Brennan elaborated in his concurrence, there was no evidence that the New York exemptions directly promoted religion. "No particular activity of a religious organization — for example, the propagation of its beliefs — is specifically promoted by the exemptions. . . . General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Id.* at 689-90 (Brennan, J., concurring).

[13] 42 U.S.C. § 300z-1(a) (4) lists more than twenty-one different services for which grant recipients may receive funding. *Kendrick*, 487 U.S. at 594 n.2.

sectarian organizations or the religious activity of otherwise eligible recipients, even if that activity is arguably related to the delivery of AFLA services. *Id.* at 621-22. On this last point there was no disagreement; the Court was unanimous that funds could not be used "to further religion." *Id.* at 624 (Kennedy, J., concurring).[14]

Petitioners attempt to distinguish *Kendrick* from this case by arguing that there is a difference between a government grantee (*Kendrick*) and a recipient of a general subsidy that supports multiple speech activities. Pet. Brief at 28. This distinction is unavailing. Contracted Independent Organization (CIO) recipients, like AFLA recipients, must meet certain eligibility criteria and receive University funding for enumerated activity only. Pet. App. 61a. The mere fact that secular publications, but not religious publications, generally receive funding is not qualitatively different from AFLA's funding of secular counseling and educational services but not religious counseling and educational services.[15] But most importantly, Petitioners are not seeking funding for activity to which religious speech is merely ancillary or represents some by-product. Petitioners are requesting funding for the religious activity itself. In this sense, this case is even easier than *Kendrick* and the Court's previous funding cases.

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[14] Accordingly, a ruling that government cannot prohibit the expenditure of public funds for religious purposes merely because the funds are distributed under a program that is generally available would call into question the constitutionality of prohibitions contained in a host of federal programs. *See* statutes listed *supra* n. 7.

[15] In this sense, *Kendrick* too could be characterized as a free speech case. However, the Court seemed unconcerned with any free speech implications of providing a financial benefit for secular counseling services but not for religious counseling services.

For the same reasons, this case is distinguishable from *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). In *Witters*, the petitioner was eligible for vocational assistance because of his visual disability, not for activity related to the ultimate use of the state funds. Once eligible, the petitioner had the "full opportunity to expend [the] vocational rehabilitational aid" among a "huge variety" of choices. *Id.* at 488.[16] In contrast, Petitioners' eligibility rests on the ultimate use of the funds. Unlike the situation in *Witters*, Petitioners are asking for direct payment for their religious activity, not for the freedom to apply funds for which they are independently entitled toward one of several choices. Finally, unlike the situation in either *Witters* or *Mueller v. Allen*, 463 U.S. 388 (1983), the University's payment for Petitioners' religious message could hardly be considered an "attenuated financial benefit." *Id.* at 400. Accordingly, while breadth of the recipient class was important for the Court's determination in *Witters*, it was not the *sine qua non* of the case.[17]

Finally, Petitioners are beside the point in arguing that the mere receipt of government funds does not turn a private recipient into a state actor or result in government imprimatur of the recipient's activities. Pet. Brief at 25-26. The issue

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[16] In fact, the Court analogized the situation in *Witters* to that of a state employee donating "all or part of [his] paycheck to a religious institution, all without constitutional barrier." *Id.* at 487.

[17] The *Witters* majority, as well as the concurrences, clearly indicated that a "direct subsidy" of the petitioner's religious education would be unconstitutional. *Id.* at 488. Although three justices also argued that the ultimate effect of the program should be "viewed as a whole," *id.* at 492 (Powell, J., concurring), thereby implying that it is unnecessary to consider the application of funds in the individual case, that statement was qualified by the decision in *Kendrick* where all justices agreed that, notwithstanding the breadth of the class, it would be improper to use federal funds to further a specific religious purpose.

here is not government endorsement of the religious message of Petitioners' speech but of government aid and support of that religious activity. *See Grand Rapids*, 473 U.S. at 385-89. While the "endorsement" test may be an effective analytical tool for reviewing the constitutionality of religious symbols or access, it is less effective when the issue concerns government funding of both religious and nonreligious activities. *See Kendrick*, 487 U.S. at 611-13 (employing the "direct aid" analysis of *Grand Rapids* and *Meek*).

C. Contrary to Claims of Petitioners and Supporting *Amici*, the No-Funding Principle Is Consistent with the Principles Underlying the Establishment Clause and Longstanding Precedent.

The principle prohibiting public funding of religious activity has its basis in the events surrounding the framing of the First Amendment and is supported by approximately 150 years of judicial and legislative application of that amendment. One of the primary purposes of the Establishment Clause was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting); *Lee v. Weisman*, 112 S. Ct. 2649, 2662 (1992) (Blackmun, J., concurring). The language of the clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting). As designed by the Framers, the no-funding principle ensures that no person is compelled to support the propagation of any other's religious beliefs, or even his own, and protects the

integrity and independence of religion by ensuring that it does not become dependent on the state for financial sustenance.[18]

Petitioners and their supporting *amici* present a crabbed, if not novel, account of the historic record supporting the Court's no-funding decisions. Contrary to Petitioners' account of the controversy surrounding the proposed Virginia assessment supporting "Teachers of the Christian Religion," *see* Pet. Brief at 36-37, leaders such as James Madison, George Mason and Thomas Jefferson were not concerned solely with preventing preferential support of religion but with *any* tax monies being used to support religious ministries.[19] Madison, for one, opposed any public support for religion, regardless of the amount or the circumstances. *See* Memorial and Remonstrance ¶ 3.[20]

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[18] *See* Thomas Jefferson, "Act for Establishing Religious Freedom" (1786), reprinted in John F. Wilson & Donald L. Drakeman, Church and State in American History 2d ed., 73-74 (Boston: Beacon Press, 1987).

[19] As a threshold matter, Petitioners are incorrect in characterizing the Virginia assessment as benefitting religion solely. Undesignated tax monies would have gone to fund schools. But the exact arrangement is beside the point. As Professor Laycock has written, "Virginians understood the vote against the bill as a rejection of any form of financial aid to churches." Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897, 899 (1986).

[20] The true nature of Madison's opposition to the general assessment bill can be seen in his correspondence to his father and Jefferson in 1785. Madison contrasted the assessment bill with an act incorporating the Episcopal Church, calling the former bill "a much greater evil" because its broader application made the religious tax more palatable. *See* letters to Jefferson, January 9, 1785, and to his father, January 6, 1785, reprinted in Robert S. Alley, ed., James Madison on Religious Liberty 66-67 (Buffalo: Prometheus Books, 1985). Madison believed that *any* public support for religion would lead to the "perversion" of both religion and

Accordingly, while serving as President, Madison vetoed a bill that would have granted a parcel of land to a Baptist church in the Mississippi Territory even though land grants for secular purposes were common.[21] Jefferson's opposition to all forms of public support of religion, regardless of the breadth of the class, was equally unqualified. Jefferson considered the mere existence of a religious assessment "sinful and tyrannical." Even forcing a man "to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Act for Establishing Religious Freedom. *Accord Everson*, 330 U.S. at 41 (Rutledge, J., dissenting) ("Not the amount but 'the principle of assessment was wrong.'"). As the *Everson* Court stated in summarizing the Virginia controversy,

> [t]he people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or to otherwise assist

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the civil government. Memorial and Remonstrance ¶¶ 5, 7-8 (reprinted in the Appendix to *Everson*, 330 U.S. at 63-72). According to Justice Rutledge, "Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed." *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

[21] *See* Veto Message, February 28, 1811, reprinted in Alley, James Madison on Religious Liberty 79-80. One week earlier, Madison vetoed a bill incorporating an Episcopal church in Alexandria, Virginia, that would have vested the church with "authority to provide for the support of the poor and the education of poor children . . . [which] would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civic duty." Veto Message, February 21, 1811, reprinted in *id.*, at 79.

> any or all religions, or to interfere with the beliefs of any religious individual or group.

Id. at 11. Consequently, it is absurd to suggest that these leaders of American disestablishment would have supported aid for religious speech or instruction if it had merely been packaged in a more inclusive form of assessment. *Accord*, *Lee*, 112 S. Ct. at 2672 (Souter, J., concurring); Laycock, *'Nonpreferential' Aid to Religion*, *supra* at 923.

Amici Christian Legal Society *et al.*, seek to discredit the no-funding principle (and thereby taint this Court's decisions) by tying its origins to the nineteenth century conflict between Protestants and Catholics over the allocation of public funding of religious schools. The nativist-Catholic conflict of the past century was truly a sad chapter in our nation's history and was a distracting force in the evolution of America's public schools.[22] But nativism was not the only impulse that influenced the development of public education and was even less of a force in the development of the no-funding principle. Petitioners' *amici* oversimplify the history by omitting other significant animating impulses.

America's first truly public schools had their beginnings in the initial three decades of the nineteenth century, before the rise in Irish and German Catholic immigration in the mid-1830s. The Free School Society of New York, later the Public School Society, was created in 1805 by reform-minded individuals to provide a system of universal education for all classes of children. The Society leaders quickly seized upon the notion of nonsectarian education as a means of attracting children of all faiths and

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[22] *See* Ray Allen Billington, The Protestant Crusade, 1800-1860 142-58 (New York: The Macmillan Co., 1938); Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 Rev. of Pol. 503 (1970).

of providing an alternative to the competitiveness found among the various denominational schools. The first funding battles raising nonestablishment arguments against funding religious instruction occurred in the 1820s between the Free School Society and Baptist and Methodist schools. In 1825, the New York Common Council decided that henceforth only nonsectarian schools would be eligible to participate in the school fund, a decision that made the Free School society, now the Public School Society, the primary recipient of the common school fund.[23]

The first serious challenge to the school funding formula by Catholics occurred in New York between 1840 and 1842.[24] But as Justice Brennan discussed in his *Lemon* concurrence, by that time the arguments against funding religious schools had pretty well been set. *Lemon*, 403 U.S. at 646-48 (Brennan, J., concurring). Petitions for *pro rata* shares of public school funds were routinely turned aside by education officials, often citing nonestablishment concerns. State legislatures also responded to the "School Question" controversy by enacting laws and constitutional provisions prohibiting appropriations for religious or sectarian instruction.[25] Religious funding proposals were no more

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[23] William Oland Bourne, History of the Public School Society of the City of New York, 1-8, 44-75; (New York: William Wood & Co., 1870); Diane Ravitch, The Great School Wars: New York City, 1805-1973, 6-26 (New York: Basic Books, 1974); *accord Lemon*, 403 U.S. at 645-49 (Brennan, J., concurring).

[24] *See* n. 23, *supra*.

[25] Although *amici* Christian Legal Society, *et al.*, are correct that Catholic animus played a role in the events surrounding President Grant's 1875 no-funding proposal and the unsuccessful Blaine Amendment, again, other factors also motivated supporters of the Blaine Amendment and similar no-funding proposals to various state constitutions. *Amici*'s account minimizes the widespread, sincere interest in protecting America's

successful in the courts where judges uniformly struck down arrangements designed to provide public support for religious instruction.[26] Thus, as Justice Brennan summarized in *Lemon*, "for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an

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fledgling public education system and in ensuring conformity with understandings of nonestablishment of religion. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. of Legal Hist. 38 (1992). These other motivations cannot be discounted. In one speech in support of the Blaine Amendment, Senator Oliver P. Morton of Indiana provided his understanding of the nonestablishment principle:

> "It is in my opinion an essential principle of American liberty and one upon which the perpetuity of our Government depends that we shall have perfect freedom of religious worship, that there shall be no established church, no religion established by law that is taught by law, and that so far from the States being left free to establish a church if they see proper, or to establish denominational schools at public expense, I believe that the safety of this nation in the far future depends upon their being deprived of any such power. I believe that the example of one State establishing a religion, or doing what amounts to the same thing in principle, establishing denominational schools to be supported at public expense, endangers the perpetuity of the nation. The support of a school by public taxation is the same thing in principle as an established church."

4 Cong. Rec. 5585 (1876).

[26] *Smith v. Donahue*, 195 N.Y.S. 715 (App. Div. 1922); *Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918); *Williams v. Board of Trustees*, 191 S.W. 507 (Ky. 1917); *Dorner v. School Dist. No. 5*, 118 N.W. 353 (Wis. 1908); *Atchison, T. & S.F.R. Co. v. Atchison*, 28 P. 1000 (Ka. 1892); *Synod v. State*, 50 N.W. 632 (S.D. 1891); *Cook County v. Chicago Indust. School*, 18 N.E. 183 (Ill. 1888); *Nevada v. Hallock*, 16 Nev. 373 (1882); *Otken v. Lamkin*, 56 Miss. 758 (1879); *People v. McAdams*, 82 Ill. 356 (1876); *St. Mary's Indust. School v. Brown*, 45 Md. 310 (1876); *Jenkins v. Andover*, 103 Mass. 94 (1869); *People v. Board of Education*, 13 Barb. 400 (N.Y. 1851).

impermissible involvement of secular with religious institutions." 403 U.S. at 648-49.

Understandably, the argument that nonsectarian schools only could receive public tax monies appeared specious to Catholic leaders who saw the Protestant bias of the nation's public schools as being anything but nonsectarian. But while their critique of the purported neutrality of the public schools had merit, the inconsistencies in the application of the nonsectarian principle could not undermine the force of no-funding principle. Many of the early leaders of the American public school movement, from DeWitt Clinton of New York to Horace Mann of Massachusetts and Henry Barnard of Rhode Island sincerely believed in the virtues of nonsectarian education and in the constitutional necessity of adhering to the no-religious funding principle. Mann, who was criticized by both Catholics and evangelicals for making his schools too secular, argued that the public funding of religious schools violated rights of conscience and would lead to religious divisiveness. Taxing a man to support religious schools, Mann wrote, "would satisfy, at once, the largest definition of a Religious Establishment."[27]

Thus, the no-funding principle had its basis in Madison and Jefferson's notions of noncoercion and their concern for the integrity and independence of religion. Moreover, the funding battles of the nineteenth century and the early no-funding decisions were not based primarily on Catholic animus, but on sincere attempts to protect the integrity and universality of public education while abiding by constitutional norms.

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[27] Horace Mann, Twelfth Annual Report of the Board of Education - 1848 113, 116-17, 127-38 (Boston: Dutton and Wentworth, Printers, 1849).

D. The Court's Access Decisions Do Not Control with Issues of Funding.

The Court's decisions upholding rights of access to public facilities for religious speech do not provide authority for the allocation of public funds for religious activity. There is nothing in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993), *Board of Education v. Mergens*, 496 U.S. 226 (1990), or *Widmar v. Vincent*, 454 U.S. 263 (1981), that suggests that the rules governing access extend to providing financial aid for religious activity. *See Kendrick*, *supra*.

Access and funding are "qualitatively different" matters, as are direct subsidies and tax exemptions. *Walz*, 397 U.S. at 690 (Brennan, J., concurring). A subsidy involves "the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole." *Id.* In comparison, access, like an exemption, involves no such money transfer and assists the recipient only passively. In fact, access is even less similar to a subsidy than an exemption in that the access recipient accrues no financial benefit and the general taxpayer does not suffer even an indirect burden through an increased tax liability.[28]

The fact that access is qualitatively different from a funding benefit is borne out in the *Lamb's Chapel* decision where the Court stated that by providing access, "any benefit to religion or the Church would have been no more than incidental." *Lamb's Chapel*, 113 S. Ct. at 2148; *accord*

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[28] Although this Court recognized the similar effect of subsidies and exemptions on recipients in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983), it acknowledged that other structural differences exist between a subsidy and an exemption. *Id.* at 544 n.5 (relying on Justice Brennan's concurrence in *Walz*).

Widmar, 454 U.S. at 274 ("any religious benefits of an open forum at UMKC would be 'incidental' within the meaning of our cases."). Significantly, in *Widmar* the Court distinguished the absence of a benefit to religion under the access policy with the financial benefit the church-related colleges would have received under the 20 year restriction on religious use struck down in *Tilton*. *Widmar*, 454 U.S. at 272 n.12. By contrast, the benefit to religion of a direct money subsidy is undeniable and not equivalent to the passive nature of an access policy. *Walz*, 397 U.S. at 689-90 (Brennan, J., concurring). *Accord*, *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 708-09 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994) (relying on the *Widmar* Court's distinction of *Tilton* to reject arguments that providing a church access to a public school at a non-profit rental rate subsidizes religious practice).

This distinction between funding and access finds support in the Framers' understanding of the nonestablishment principle. In an example strikingly on point, Thomas Jefferson supported allowing religious groups to establish chairs for religious instruction on the boundaries of the University of Virginia campus and providing them access to the library and other facilities. However, Jefferson categorically opposed the creation of a professorship of divinity and the expenditure of University funds for religious instruction. As he stated in a letter to Doctor Thomas Cooper on November 2, 1822:

> In our annual report to the legislature, *after stating the constitutional reasons against a public establishment of any religious instruction,* we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have free use of our library, and every

> other accommodation we can give them; preserving, however, their independence of us and of each other.[29]

Following his succession of Jefferson as Rector of the University in 1826, Madison approved the appointment of a university chaplain, but required that his salary be paid through the voluntary contributions of the students' parents.[30] This historic evidence strongly suggests that both Jefferson and Madison approved of providing religious groups access to public facilities on a nondiscriminatory basis but saw the principle of nonestablishment as barring the expenditure of any funds for the resulting religious activity. This historic evidence also conforms with the Court's access decisions, but not with extending those decisions to allowing funding of religious activity. The Court should adhere to this limiting principle of upholding access but denying funding for religious activity.

II. THE CONFLICT BETWEEN THE ESTABLISHMENT AND FREE SPEECH CLAUSES IS OVERSTATED

The conflict between the Petitioners' free speech rights and the Establishment Clause prohibitions is overstated in this case. First, Petitioners already have access to University facilities as a CIO and have full opportunity to distribute *Wide Awake* on campus. They are afforded a full

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[29] Letter to Doctor Thomas Cooper, November 2, 1822, reprinted in Martin A. Larson, ed., Jefferson: Magnificent Populist 260 (Greenwich, CT: Devin-Adair Pub., 1984) (emphasis supplied). *Accord McCollum v. Board of Education*, 333 U.S. 203, 245-46 (1948) (Reed, J., dissenting).

[30] Leo Pfeffer, "Madison's 'Detached Memoranda'," in Merrill D. Peterson & Robert C. Vaughan, The Virginia Statute for Religious Freedom 296 (New York: Cambridge University Press, 1988).

range of free speech rights short of a government subsidy of their speech. Pet. App. 8a; 53a n.8. Although the University has created a limited public forum for access, it has not done so for funding purposes. Religious speech is among several other forms of speech that the University has chosen not to fund.

Moreover, if a direct conflict between the Free Speech and Establishment clauses does exist in this case, it is a reflection of the inherent limiting quality of the Establishment Clause that cannot be minimized without causing injury to the clause's function and purpose. Any balancing must also take into account how government funding and support of private religious speech transforms the nature of Petitioners' free speech interest.

A. The Mere Fact That the University Has Created a Limited Public Forum for Access to Facilities Does Not Mean It Has Created a Limited Public Forum for Funding Purposes.

Petitioners' claim of content and viewpoint discrimination is necessarily dependent on the nature of the public forum the University has created for funding purposes. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800-01 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983). *Amici* contend that the district court below correctly determined that the University's policy of funding only particular categories of student organizations and activities reveals an intent and a practice of maintaining a closed forum for funding purposes. Pet. App. 46a-55a. The mere fact that the University has afforded Petitioners recognition as a CIO and access to the University facilities does not affect the separate status of the Student Activities Fund (SAF).

In determining whether a limited public forum has been created in areas other than traditional or quintessential public fora, the Court looks at several factors including the physical characteristics of the property, its history and practice of past use, and the intent of the government in establishing "a place or channel of communication for use by the public at large." *Cornelius*, 473 U.S. at 802; *ISKCON v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *U.S. v. Kokinda*, 497 U.S. 720, 726-29 (1990). An examination of all of these various factors reveals the University has not created a limited public forum. Because of its discretionary, limited and controlled nature. *See Healy v. James*, 408 U.S. 169, 182 n.8 (1972), the SAF possesses neither the "objective, physical characteristics" nor a history or tradition of a limited public forum. *Lee*, 112 S. Ct. at 2718 (Kennedy, J., concurring).

As all sides acknowledge, the University is under no obligation to fund student speech. *Healy*, 408 U.S. at 182 n.8; *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988). Thus initially, it cannot be argued that the SAF has the physical characteristics of a public forum. Moreover, the University has not "opened the SAF coffers to all CIOs" but has excluded numerous other groups and forms of activity from receiving funding. Pet. App. 51a, 62a-63a (excluding from funding fraternities, sororities, honor societies, political organizations and activities, social entertainment expenses, philanthropic contributions and activities, and religious organizations and activities). *Accord Widmar*, 454 U.S. at 280 (Stevens, J., concurring) ("A university legitimately may regard some subjects as more relevant to its educational mission than others."). Thus the University has both a tradition and a practice, as well as a

clear intent, of limiting access to the SAF.[31] As the district court found, "[t]he consistent, purposeful exclusion of certain groups indicates that the SAF is indeed a nonpublic forum." Pet. App. 53a.

Moreover, the long-standing and consistent practice of funding only certain groups and activities but not others leads to the conclusion that the University does not engage in viewpoint discrimination but content-based discrimination only.[32] *See Widmar*, 454 U.S. at 270-71 (UMKC's exclusion of Cornerstone constitutes content-based discrimination). This Court's finding of view-point discrimination in *Lamb's Chapel* was dependent on the facts in that case: the church sought access to make an isolated presentation on an otherwise includable topic. 113 S. Ct. at 2147. In fact, the Court reaffirmed language from *Cornelius* that speakers may be excluded from nonpublic fora based on their class or the content of their speech. *Id.* Similarly, in *Gohn*, the court found viewpoint discrimination existed based on evidence that the gay and lesbian students were denied funding because the student senators disagreed with the group's beliefs. 850 F.2d at 367. Here, there is no evidence the University singled out Petitioner or denied funding for *Wide Awake* because it disagreed with its views or because of the religious perspective of any of its articles. Instead, based on long-

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[31] The mere fact that 118 of 135 requests for funding were approved does not indicate that the University created a *de facto* limited public forum, only that a significant number of groups met the University's funding criteria. The more appropriate comparison is to the 343 organizations that qualified as CIOs. *Accord Cornelius*, 473 U.S. at 804.

[32] One important indicia of viewpoint discrimination is the scope of the excluded class. Where a denial of access focuses on one group, then there is reason to suspect that an unpopular viewpoint is being suppressed. *Cf. R.E.A. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

standing policy of funding only certain categories of activities, Petitioners were denied funding because of *Wide Awake*'s overall status as a religious newspaper.

Petitioners' description of Christianity as a "worldview" as opposed to a distinct category or subject is beside the point. The focus is on the University's policies and actions. Whereas almost every action or decision by a government body can be cast as viewpoint discrimination, such did not occur here. The mere exclusion of religious activity along with other nonfunded categories does not transform the policy into one that "suppress[es] expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

Accordingly, the district court was correct in determining that the SAF constitutes a nonpublic forum and that, at best, the University has engaged in content-based discrimination by denying Petitioners funding.

B. Any Conflict That Exists in This Case Between the Free Speech and Establishment Clauses Is Inherent in the Nature of the First Amendment.

In their effort to show a conflict between the Establishment and Free Speech clauses Petitioners and their supporting *amici* devalue the purpose and role of the Establishment Clause. It is axiomatic that religious liberty is the primary value that underlies both provisions of the religion clause. But the religious liberty value is not synonymous with religious free exercise nor does it adequately describe the multiple functions of the

nonestablishment principle.[33] Nonestablishment furthers other values such as ensuring religious pluralism and voluntarism,[34] equality among religions (ensuring that no religion gains dominance or an unfair advantage),[35] and the integrity and legitimacy of both religion and democratic government.[36] The Establishment Clause is the only provision in the First Amendment that ensures certain institutional roles and protects the liberty and equality of citizens generally. But in order to do so, the Establishment Clause, unlike other First

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[33] *See* William P. Marshall, *Truth and the Religion Clauses*, 43 DePaul L. Rev. 243 (1994) (identifying multiple values underlying the religion clauses). Accordingly, *amici* reject arguments by commentators such as Richard John Neuhaus who has written: "[t]he establishment part of the Religion Clause is entirely, and without remainder, in the service of free exercise. Free exercise is the end; proscribing establishment is a necessary means to an end." Neuhaus, *A New Order of Religious Freedom*, 60 Geo. Wash. L. Rev. 620, 627 (1992). Rev. Neuhaus' interpretation of the religion clauses would allow for government recognition of and support for religion generally.

[34] *Allegheny County v. ACLU*, 492 U.S. 573, 610-11 (1989).

[35] *See Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994); Memorial and Remonstrance ¶ 4; Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 Univ. Pa. L. Rev. 555, 568 (1991) ("The prohibition on laws respecting establishment is primarily an equal liberty provision; only secondarily is it concerned with religious liberty in a noncomparative sense.").

[36] *See* Madison's "Detached Memoranda;" Letter to Edward Livingston, July 10, 1822 (declaring that a "coalition between Government and Religion" will have a "corrupting influence on both the parties."), reprinted in Alley, James Madison on Religious Liberty, 89-94, 82-83.

Amendment rights, has an inhibiting quality (not solely rights enhancing) that ensures these additional values.[37]

Moreover, Petitioners' free speech claim does not involve purely private speech but speech for which government funding is sought. Hence, authority discussing bright-line distinctions between private speech and government speech is not helpful. *See* Pet. Brief at 24-25 (relying on *Mergens*, 496 U.S. at 250). As this Court has noted in the Establishment Clause context, government can effectively adopt and sponsor private speech when it finances, supports or otherwise promotes the religious speech of others. *Allegheny County v. ACLU*, 492 U.S. 573, 600 (1989); *Stone v. Graham*, 449 U.S. 39, 42 (1980). Unlike an access situation, the funding of Petitioners' speech would transform its nature into quasi government-sponsored speech and remove it from the realm of purely private speech.

III. THIS COURT NEED NOT RE-EXAMINE THE *LEMON V. KURTZMAN* STANDARD FOR ADJUDICATING ESTABLISHMENT CLAUSE VIOLATIONS

This Court is again asked to revisit and discard its analytical framework enunciated in *Lemon v. Kurtzman*, 403 U.S. at 612-13, commonly called the "*Lemon* test." *See* Pet. Brief at 39-43; Brief of the American Center for Law and Justice. This course has been urged on the Court before, most recently in *Lee v. Weisman* and last term in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994). The Court declined to reconsider *Lemon* in those cases and

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[37] *See Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (identifying the "specific constitutional limitations imposed upon the exercise of congressional taxing and spending power" found in the Establishment Clause); *accord Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479 (1982).

in *Lamb's Chapel*, 112 S. Ct. at 2148 n.7; there is no compelling reason for the Court to venture down that road in this case.

This Court has never limited itself to one standard for reviewing whether a law or policy violates the Establishment Clause. As has been stated on numerous occasions, the standards of the *Lemon* test are "viewed as guidelines" or as "helpful signposts" and represent "no single constitutional caliper." *Tilton*, 403 U.S. at 677-78; *Hunt*, 413 U.S. at 741. The Court has declared its "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), and, over the past dozen years, has been true to its word applying several styles of analysis as appropriate. *See Kiryas Joel*, *supra* (preferential treatment; unlawful delegation of authority); *Zobrest*, *supra* (neutrality); *Weisman*, *supra* (coercion); *Allegheny*, *supra* (endorsement); *Marsh v. Chambers*, 463 U.S. 783 (1983) (historic). Even though the *Lemon* test has been applied intermittently to these cases, the Court's decisions clearly indicate that there is no "Grand Unified Theory" for Establishment Clause analysis. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, concurring in part and in the judgment).

Contrary to claims of confusion by Petitioners' *amici*, lower courts have come to recognize the flexibility in Establishment Clause adjudication and have not restricted their analysis to the *Lemon* factors. *See e.g. Harris v. Joint Sch. Dist.*, No. 93-35839, 1994 U.S. App. LEXIS 32646 (9th Cir. Nov. 18, 1994); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir.), *cert. denied*, 113 S. Ct. 2950 (1993); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993). Conversely, many recent applications of the *Lemon* test have resulted in holdings that even Petitioners and their *amici* would not consider to be

hostile to religious expression. *See Lamb's Chapel*, *supra*; *Mergens*, *supra*; *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994); *Pope v. East Brunswick Bd. of Ed.*, 12 F.3d 1244 (3d Cir. 1993); *Jones*, *supra*; *Adler*, *supra*. *Accord Weisman*, 112 S. Ct. at 2661 (reaffirming that the Court's decisions express "no hostility" toward religion.). Apparently, the complaint here is not so much with the application of *Lemon* itself but with the outcome of particular cases with which Petitioners and their *amici* disagree. This does not represent a sensible rationale for reversing an analytical standard that serves as much of the basis for thirty years of Establishment Clause jurisprudence. *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification").

Consequently, the Court should decline the invitation of Petitioners and *amicus* ACLJ to reverse *Lemon*.

CONCLUSION

For the foregoing reasons, *amici* pray that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

Samuel Rabinove
American Jewish
Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

Steven K. Green
(Counsel of Record)
Americans United for
Separation of Church
and State
1816 Jefferson Place, NW
Washington, DC 20036
(202) 466-3234

Ruth Lansner
Jeffrey P. Sinensky
Steven M. Freeman
Debbie N. Kaminer
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including filing an *amicus* brief on behalf of the petitioners in *Lamb's Chapel v. Center Moriches School District*. Americans United is composed of approximately 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation. Americans United members sincerely believe that the funding of religious speech and activity violates core notions of church-state separation.

The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, we believe, has been the cornerstone of religious liberty for all in America. Accordingly, we believe that it is not a proper function of government to fund any religious

activities. This is why we join in the submission of the brief in this case, as we have in numerous earlier cases relating to the principle of separation.

Anti-Defamation League

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in such cases as *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids v. Ball*, 473 U.S. 363 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Abington v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

No. 94-329

(16)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

—v.—

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENTS

Marjorie Heins
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Stephen B. Pershing
ACLU of Virginia
6 North 6th Street
Richmond, Virginia 23219
(804) 644-8022

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is one of its statewide affiliates. Since its founding in 1920, the ACLU has participated in numerous Establishment Clause and free speech cases before this Court, both as direct counsel and as *amicus curiae*, including most recently *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. __, 113 S.Ct. 2141 (1993); *Zobrest v Catalina Foothills School Dist.*, 509 U.S. __, 113 S.Ct. 2462 (1993), and *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. __, 114 S.Ct. 2481 (1994).

STATEMENT OF THE CASE

The University of Virginia recognizes and provides facilities and services to a wide range of student activities, known as "Contracted Independent Organizations" (CIOs). Most CIOs may also apply for student activity funds, which are derived from an annual $14 student activity fee.

> The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University . . . . [T]he monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purposes of the University as well as with State and Federal law.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Rosenberger v. The Rector and Visitors of the University of Virginia, 793 F.Supp. 175, 180 (W.D.Va. 1992), *aff'd*, 18 F.3d 269 (3d Cir. 1994).

Pursuant to its guidelines, however, the University does not fund either "religious organizations"[2] or "religious activities."[3] If a student organization is not disqualified on religious or other grounds, and its goals are deemed generally "consistent with the educational purposes of the University," the University then examines the group more closely, including investigation of possible discriminatory conduct, to decide if the group should receive funding. J.A. 71, ¶8.

The plaintiffs publish a student journal called "Wide Awake: A Christian Perspective at the University of Virginia." Although not affiliated with any religious institution, the journal is pervasively and concededly sectarian; its announced purpose is "to challenge Christians to live, in word and deed, according to the faith they proclaim[,] and to encourage students to consider what a personal relationship with Jesus Christ means." *Rosenberger*, 18 F.3d at 272. There is no dispute that "Wide Awake" is a religious activity within the meaning of the University's funding guidelines. *Id.* at 273. Accordingly, although it is a CIO with access to University computers, printers, and other publication equipment, *id.*, its application for direct funding was denied.[4]

Petitioners challenged the funding denial on free speech, free exercise, and equal protection grounds. The federal district court, ruling on cross motions for summary judgment, rejected all three claims. 793 F. Supp. 175. The court concluded that the student activity fund was a nonpublic forum and that the religious exclusion was reasonable and viewpoint-neutral; that the funding denial did not substantially burden petitioners' freedom of religion; and that no "discriminatory intent" was shown with respect to alleged disparate funding of religious groups. *Id.* at 178-83. Without fully addressing the Establishment Clause issue, the district court did note that the University's refusal to fund religious groups because of church-state concerns was "reasonable." *Id.* at 181.

The Court of Appeals for the Fourth Circuit affirmed, but gave more scrupulous consideration to petitioners' free speech claims. The court of appeals concluded that the religious exclusion was a viewpoint-based unconstitutional condition which could be upheld only if narrowly drawn and justified by a compelling state interest. 18 F.3d at 277-83.[5] The Fourth Circuit held that the Establishment Clause con-

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[2] The University's guidelines define "religious organization" as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Rosenberger*, 18 F.3d 269, 271 n.2 (3d Cir. 1994). Fraternities and sororities, "political" organizations, and groups with exclusionary membership policies are also ineligible for funding.

[3] The guidelines define "religious activity" as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." 18 F.3d at 271 n.2. Other excluded expenditures are "honoraria or similar fees, . . . social entertainment and related expenses, . . . philanthropic contributions and activities; and . . . political activities." *Id.* at 271.

[4] Because "Wide Awake's" funding application was denied, it was not subjected to the post-approval process of determining how much financial aid it should receive. This process involves an evaluation of "(1) the size of the group; (2) the University-wide benefits conferred by the group's activities; and (3) the group's financial self-sufficiency." *Rosenberger*, 18 F.3d at 271. If an organization is approved for financial aid, the University pays its costs directly after reviewing vouchers submitted by the group and determining that the expenditures are proper. *Id.*

[5] The court did not view public forum analysis as necessary or appropriate, given the factual context -- "content-based discrimination relating to government-generated burdens or benefits." 18 F.3d at 287.

stituted such a compelling interest because direct government funding of religious activities like "Wide Awake" would violate two of the three prongs of the test set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

First, according to the court of appeals, funding would have a primary effect of advancing religion because

> it would be difficult to view awarding SAF monies to "Wide Awake" as anything but state sponsorship -- and therefore advancement -- of religious belief . . . . Using public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation.

18 F.3d at 285. Second, funding religious activities would foster excessive government entanglement with religion, both because of its "potentially divisive political effect" and because it would "send an unmistakably clear signal that the University of Virginia supports Christian values." *Id.* at 286.[6]

The petition for *certiorari* followed.

SUMMARY OF ARGUMENT

This case presents a conflict between free speech and Establishment Clause principles. Under ordinary circumstances, government is barred from requiring relinquishment of constitutional rights as a condition of access to benefit programs. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[6] The Fourth Circuit viewed the free exercise claim as "abandoned," 18 F.3d at 277 n.23; and disposed of the equal protection argument on the ground that petitioners "fail[ed] to argue discriminatory intent as a matter of law." *Id.* at 288.

In addition, the Free Speech Clause requires viewpoint neutrality in the government's distribution of subsidies or other benefits. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983). Thus, although government may choose to subsidize one constitutionally protected activity and not another, *Rust v. Sullivan*, 500 U.S. 173 (1991), it may not base its decisions on the viewpoints or ideas expressed by those seeking funds. This is particularly true for government programs that themselves support free speech: universities, public fora, subsidies for scientific research or the arts.

To the extent that religious expression is to be considered a "viewpoint" for purposes of the speech clause, *Lamb's Chapel*, 113 S.Ct. at 2147-48, such expression cannot ordinarily be denied government benefits, such as access to meeting space, that are made available to other "viewpoints." Under a viewpoint analysis, as the Fourth Circuit has held, the University's exclusion of "religious activities" from funding eligibility *prima facie* violates the principle of viewpoint neutrality, or under an unconstitutional conditions analysis is presumptively defective in that it requires a sacrifice of expressive freedom for the sake of a government benefit.[7]

The Establishment Clause, however, prohibits direct government funding of religion. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Committee for Public Ed. and Religious*

[7] Alternatively, to the extent that the religious expression in this case is deemed excludable from University funding because of its religious subject matter, *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), the decision not to fund the expressive activity at issue would be impermissible even in a nonpublic forum unless demonstrably reasonable, and in a traditional public forum or its equivalent would violate the free speech guarantee unless justified by a compelling governmental interest.

Liberty v. Nyquist, 413 U.S. 756 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Contrary to the Fourth Circuit's reasoning, this is not because government funding necessarily implies endorsement. Indeed, it is a corollary of the principle of viewpoint neutrality that government subsidies, especially in the area of free expression, no more imply endorsement or sponsorship than does the government's maintenance of public fora where all can speak, or public libraries where authors of myriad viewpoints, from Marx to Madonna, are represented.

The Establishment Clause bars direct funding of religion for reasons independent of implied endorsement. Levying taxes to support religion was the main abuse that the framers in drafting the Establishment Clause sought to prevent. The Clause is unique in recognizing that government subsidy of religion through coercive taxation violates fundamental rights of individual conscience. When government funding for religion is involved, therefore, the Establishment Clause is best understood as a constitutionally ordained exception to the doctrines of unconstitutional conditions and viewpoint neutrality. Any other rule would, at the very least, require the Court to reexamine nearly a half-century of cases holding that the Establishment Clause forbids direct aid to parochial education even though the state simultaneously supports a secular, public education system. In our view, such a drastic departure from precedent is both unwarranted and unwise.

Petitioners argue that there is no meaningful difference between direct funding and other benefits to which the University admits religious groups are entitled: meeting space, use of University facilities, even tax exemptions and credits. But, as this Court explained in *Walz*, direct payments differ materially from indirect and incidental forms of assistance. Indirect aid, ranging from police and fire services to tax credits, does not require discretionary decisionmaking or the

active, affirmative transfer of government funds to church coffers. In our contemporary world, there is no way to sever religion from all forms of government assistance, nor is such absolute separation constitutionally required. But direct subsidies are qualitatively different, and violate the core meaning of the Establishment Clause, as the taxpayer standing cases recognize. *See Valley Forge v. Americans United*, 454 U.S. 464, 479 (1982).

A rule against direct financial support of religious activity does not mean that no student publication or group that receives University funds can address the question of religion, mount plays or art exhibits that reflect religious issues, or print any articles written from a religious viewpoint. The Establishment Clause prohibits direct funding only of pervasively sectarian activity, such as religious worship, training, and proselytizing. That the line-drawing may be difficult in some cases does not mean that it cannot be accomplished. If the law were otherwise, the Establishment and Free Exercise Clauses themselves would become meaningless. For every case involving either clause initially requires a determination whether the activity in question is in fact religion.

ARGUMENT

I. THE UNIVERSITY'S POLICY PRESUMPTIVELY VIOLATES THE FIRST AMENDMENT'S FREE SPEECH GUARANTEE

A. The Policy Constitutes Viewpoint Discrimination In The Distribution Of A Government Subsidy

Although individuals and groups may have no right to a public benefit or subsidy, government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan v. Taxation with*

Representation, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959), and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[8] Such "viewpoint discrimination" in the distribution of public funds carries special danger because it gives government the power, by manipulating the terms of subsidy programs, to "curtail expression of a particular point of view," *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), thus suppressing disfavored viewpoints and shrinking the marketplace of ideas.[9]

In *Rust v. Sullivan*, 500 U.S. 173, this Court emphasized the difference between unconstitutional viewpoint discrimination and legitimate limitations on the scope of subsidy programs. In particular, *Rust* reaffirmed the principle that viewpoint discrimination in government subsidies is prohibited. *Id.* at 192. The Court concluded, however, that the principle of viewpoint neutrality had not been violated in *Rust*. The Court reached this conclusion by noting that, unlike *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), *Rust* did not involve "a general law singling out a disfavored group on the basis of speech content," but a simple "refus[al] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

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[8] The court of appeals in its opinion merged the separate issues of viewpoint discrimination and unconstitutional conditions, 18 F.3d at 278-81. A subsidy may be impermissibly viewpoint-based yet not amount to an unconstitutional condition, *i.e.*, a forced relinquishment of a constitutional right. *See* §IB, *infra*. Likewise, an unconstitutional condition may be unrelated to the viewpoint of speech.

[9] *See also Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988)("a [student] group has no right to funding, but when funds are made available, they must be distributed in a viewpoint-neutral manner, absent other considerations"); *cf. Board of Education, Island Trees School Dist. v. Pico*, 457 U.S. 853, 871 (1982)("[o]ur Constitution does not permit the official suppression of *ideas*)(emphasis in original).

Id. at 194.

In this case, the University has not established and funded a defined program or project. Instead, it has set aside a pool of funds for use by publications and other student groups whose activities "relate[] to the educational purpose of the University."[10] Thus, the facts of this case more closely resemble *Ragland* than *Rust*. Like *Ragland*, the decision to exclude one category of otherwise fundable activity based on its viewpoint discriminates in funding based on the content of the students' ideas. As a matter of free speech doctrine, moreover, the Court has recently made clear that

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[10] The "educational purpose" test itself is not objectionable in the context of student activity funding, and is facially consistent with the principle of viewpoint neutrality. So long as it is not used as a subterfuge for viewpoint discrimination, educational purpose is a legitimate limit on funding, just as academic merit is a legitimate basis for tenure decisions, and artistic merit a legitimate basis for government grants to artists. *See Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981)("[n]or do we question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'")(quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring), and citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-13 (1978)); *Widmar*, 454 U.S. at 278-80 (Stevens, J., concurring)(university may legitimately decide to reserve room for performance of HAMLET rather than showing of Mickey Mouse cartoons, but "may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted"); *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1475 (C.D.Cal. 1992) (where "limited public funds are allocated to support expressive activities, . . . some content-based decisions are unavoidable . . . [but] this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university . . . . Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not").

the general rule against viewpoint discrimination applies to religious perspectives. *See Lamb's Chapel*, 113 S.Ct. at 2147-48.[11]

The rule against viewpoint discrimination is particularly important in an academic setting, the quintessential "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). As the Court reaffirmed in *Rust*,

> [T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

500 U.S. at 200. Given the importance of free speech and inquiry at the university level, excluding any viewpoint from general funding eligibility raises, at a minimum, serious constitutional questions.

B. The Policy Presumptively Imposes An Unconstitutional Condition

The exclusion of religious viewpoints from funding eligibility also presumptively imposes an unconstitutional condition. At least since *Speiser v. Randall*, 357 U.S. 513, and *Perry v. Sindermann*, 408 U.S. 593, it has been clear that government cannot condition a subsidy or other benefit on

[11] Since the exclusion from funding here is viewpoint-based, as in *Lamb's Chapel*, there is no need to decide whether the subsidy program is a designated public forum. Even in a nonpublic forum, exclusions cannot be based on viewpoint. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. at 811-13; *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983).

relinquishment of a constitutional right. As the court below observed:

> Unconstitutional conditions, which make enjoyment of a government benefit contingent on sacrifice of an independent constitutional right, are *prima facie* invalid. For "if the government could deny a benefit to a person because of his constitutionally protected speech . . . his exercise of th[at] freedom[] would in effect be penalized and inhibited . . . ."

Rosenberger, 18 F.3d at 279 (quoting *Perry v. Sindermann*, 408 U.S. at 597).

The difference between an unconstitutional condition and a limitation on the terms of a subsidy is that, in the former case, exercise of constitutional rights outside the confines of the funded program is suppressed as a condition of obtaining the funds. Thus, *League of Women Voters* involved an unconstitutional condition because educational broadcasting received only 1% of its overall income from federal grants yet was barred as a condition of those grants from all editorializing, 468 U.S. at 400. As this Court explained in *Rust*, government imposes an unconstitutional condition when it

> place[s] a condition on the *recipient* of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

500 U.S. at 196 (emphasis in original).

In both *Speiser* and *Perry*, free speech was the constitutional right relinquished in exchange for the benefits, respectively, of tax exemption and state employment; in *Sherbert*

v. Verner, 374 U.S. 398 (1963), the right relinquished was free exercise of religion, in exchange for the benefit of unemployment compensation. In the present case, as the Fo th Circuit correctly ruled, the exclusion of "religious activity" from funding eligibility essentially forced the student publishers of "Wide Awake" to abandon their religious perspective entirely if they wanted even a small amount of University funding. As in *League of Women Voters*, 468 U.S. at 399-400, and *Finley v. NEA*, 795 F.Supp. at 1463-64, the restriction thus has effects beyond the bounds of the subsidized activity, and is presumptively unconstitutional.

II. THE ESTABLISHMENT CLAUSE ABSOLUTELY BARS DIRECT EXPENDITURE OF GOVERNMENT FUNDS TO SUPPORT RELIGION AND THUS OVERRIDES THE FREE SPEECH INTERESTS IN THIS CASE

A. The Establishment Clause Is An Absolute Bar To Direct Government Funding Of Religion

Despite the serious free speech concerns raised by the exclusion of religious activities and organizations from the University's funding program, the Establishment Clause forbids direct government subsidies to religion, and thus creates a constitutionally mandated exception to the usual principle of viewpoint neutrality. Petitioners attempt to circumvent this basic no-funding rule essentially by arguing that it only applies where government is sponsoring the religious message or favoring some faiths over others. But petitioners' argument has no limiting principle, is unsupported by constitutional history,[12] would eviscerate the Establishment

[12] The contemporaneous history of the Establishment Clause utterly fails (continued...)

Clause, and would require overruling nearly 50 years of this Court's jurisprudence barring expenditure of government funds for pervasively sectarian activities.[13]

The Establishment Clause bars government funding of religion for at least three important reasons. First, the framers recognized that religious free exercise was threatened, not enhanced, by government support. *See, e.g., Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2656-57 (1992); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968); *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); Mark DeWolfe Howe,

[12] (...continued)
to support the view that the Clause was only designed to bar preferential treatment of some religions over others. *See, e.g.*, Leonard W. Levy, THE ESTABLISHMENT CLAUSE (1986); Leo Pfeffer, CHURCH, STATE, AND FREEDOM (1953); Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 Wm. & Mary L.Rev. 875 (1986); James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947).

Likewise, the notion that the Clause was only meant to prohibit financial aid to religion where the government itself was dictating or sponsoring the message is belied by the fact that evenhanded subsidies to multiple churches were prohibited, as were schemes permitting taxpayer choice of which religion to support. Levy, *supra* note 11, at 25-62; Thomas J. Curry, THE FIRST FREEDOMS 198, 210-13 (1986); Pfeffer, *supra* note 11, at 133-55; Laycock, *supra*, at 896-99; Madison, *supra*; *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)(Clause bars aid to one or all religions); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 (1989)(Establishment Clause doesn't only limit "religious content of the government's own communications" but also "prohibits the government's support and promotion of religious communications by religious organizations").

[13] Because the bar on direct government funding of religious proselytizing is absolute, there is no need for the Court to engage in compelling state interest analysis as the court did below, 18 F.3d at 281-82. In any event, however, the Establishment Clause certainly qualifies as a compelling interest.

THE GARDEN AND THE WILDERNESS (1965); Madison, *supra*, 330 U.S. at 67-69. Second, they feared that government aid to religion would breed brutal, divisive, and potentially bloody rivalries among sects. *E.g., Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 749 (1976); *Lemon v. Kurtzman*, 403 U.S. at 622-23; Madison, *supra*, 330 U.S. at 69-70. Third, they respected the sanctity of individual conscience, and consequently determined to prohibit compelled tax support of ministers or churches. *Everson*, 330 U.S. at 8-14; *Edwards v. Aguillard*, 482 U.S. 578, 605-06 (1987)(Powell and O'Connor, JJ., concurring).

Thus, as numerous scholars have explained, an "establishment of religion" in colonial times was chiefly understood as financial support of religion by public taxation. *See* Levy, *supra* note 11, at 9, 61; *id.* at 25-62 (documenting state constitutional bans on forced taxation for one or all churches, in violation of individual conscience); Pfeffer, *supra note 11*, at 133-59 (1953); Curry, *supra* note 12, at 216-17, 220-22 (1986); Philip B. Kurland, "The Origins of the Religion Clauses of the Constitution," 27 Wm. & Mary L.Rev. 839, 842, 859 (1986)(use of a taxpayer's money to aid religion is an interference with that taxpayer's liberty); Laycock, *supra note 11*, at 875, 917, 922 (framers rejected any form of tax support; "religion was to be wholly voluntary").[14]

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[14] Even Professor McConnell acknowledges that "legal compulsion to support" religious activities through taxes is the essence of an Establishment Clause violation. Michael W. McConnell, "Coercion: The Lost Element of Establishment," 27 Wm. & Mary L.Rev. 933, 938 (1986).

Amici Christian Legal Society, *et al.* suggest that the no-funding principle is limited to special tax assessments specifically to aid religion. Br. at 22. Their argument ignores the realities of modern taxation and would render the Establishment Clause meaningless today when most government expenditures come from general tax funds.

The Establishment Clause is unique among constitutional provisions in its recognition that coerced tax funding for religion violates rights of individual conscience. Nowhere else in the Constitution is forced taxation to support activities that the taxpayer may oppose deemed to be a violation of fundamental liberty. *See League of Women Voters*, 468 U.S. at 385 n.16 (ordinarily taxpayers have no constitutional basis to object to government expenditures). The Court has emphasized this uniqueness: *Flast v. Cohen*, 392 U.S. at 103-04, recognized taxpayer standing to challenge expenditures for religion because

> [o]ur history vividly illustrates that one of the evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general . . . . The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.

This Court reaffirmed the Establishment Clause exception to rules against taxpayer standing in *Valley Forge College v. Americans United*, 454 U.S. at 479, explaining that the *Flast* plaintiffs could sue because their challenge was based on the Clause's "specific constitutional limitation upon the exercise by Congress of the taxing and spending power . . . ." *See also Bowen v. Kendrick*, 487 U.S. at 618 ("we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . . .").[15]

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[15] The student fees here are functionally equivalent to taxes for Estab-

(continued...)

The Justices of this Court have unanimously affirmed the constitutional bar to direct government funding of religion in majority, concurring, and dissenting opinions in nearly every Establishment Clause case. Thus, for example, in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, the Court upheld government provision of a sign language interpreter to a parochial school student, but only because "no funds traceable to the government ever find their way into sectarian schools' coffers." *Id.* at 2467-68. The Court distinguished earlier cases in which "direct grants of government aid" were unconstitutional because they "relieved sectarian schools of costs they otherwise would have borne," reiterating that "a direct cash subsidy" to a religious school is impermissible. *Id.* at 2468. In *Mueller v. Allen*, 463 U.S. 388, 400 (1983), similarly upholding a program of aid to parents, the majority took for granted that the Establishment Clause prohibits "payment of state funds to one or more churches." *See also Edwards v. Aguillard*, 482 U.S. at 605 (Powell and O'Connor, JJ., concurring)(origin of Establishment Clause in resistance to "forced support of state-established churches"); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 490-91 (1986)(Powell, Burger, & Rehnquist, JJ., concurring)(neutral aid programs permissible only because "any aid to religion results from the private choices of individual beneficiaries"); *Larson v. Valente*, 456 U.S. 228, 244 (1982)(purpose of Establishment Clause was to prohibit government from taxing citizens "for the support of a denomination to which they did not belong").[16]

Bowen v. Kendrick, 487 U.S. 589, is dispositive on this point. The Court in *Kendrick* reversed a judgment that the Adolescent Family Life Act was unconstitutional on its face, and remanded for a determination whether particular grants under the Act went to pervasively sectarian activity or otherwise directly subsidized religion. All Justices agreed that direct funding for religious proselytizing would violate the Establishment Clause.

Chief Justice Rehnquist, writing for the majority in *Kendrick*, explained that although religious institutions are not "disabled by the First Amendment from participating in publicly sponsored social welfare programs," direct government aid to "pervasively sectarian" institutions might well have the primary effect of impermissibly advancing religion,

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[15] (...continued)
lishment Clause purposes. They are involuntary, and courts have generally refused to allow students to opt out of paying them because they disagree with the views of one or more funded organizations. J.A. 37, ¶8. *See Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 300 (1992); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *but see Smith v. Associated Students of the Univ. of Cal.*, 844 P.2d 500 (Cal.Sup.Ct.), *cert. denied*, 114 S.Ct. 181 (1993)(departing from consistent line of cases rejecting dissenters' challenges to mandatory fees to fund a range of student activities).

Indeed, even if objecting students could demand a refund of a portion of their fees, the University's administering of a system of direct financial support for religion would violate the Establishment Clause. The Clause was designed to prohibit government-administered assessments for religion, even if those taxed could choose which religion to support, and even if dissenters and atheists could opt out. *See, e.g.*, Levy, *supra* note 11; Laycock, *supra note 11*.

[16] *See also Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. at 774, 780 (direct subsidies to religious activities of sectarian schools invalid); *id.* at 801 (Burger and Rehnquist, JJ., concurring in part and dissenting in part)(direct aid to religious institutions prohibited); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)("[g]overnment may not finance religious groups . . . ."); *McCollum v. Board of Education*, 333 U.S. 203, 249 (1948)(Reed, J., dissenting)("[o]f course, no tax can be levied to support organizations intended 'to teach or practice religion'"); *Everson v. Board of Educ.*, 330 U.S. at 16 ("[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion").

and would surely do so where the funding supported the institution's "religious mission." *Id.* at 609, 610. Moreover, he said, the Establishment Clause *flatly prohibits* "'government-financed . . . indoctrination into the beliefs of a particular religious faith,'" and the Court has "accordingly struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid." *Id.* at 611-12 (quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985); and *Meek v. Pittenger*, 421 U.S. 349, 370 (1975)). The Court instructed the district judge on remand to determine whether federal aid was flowing to "pervasively sectarian" institutions or was funding "materials that have an explicitly religious content or are designed to inculcate the views of a particular faith." 487 U.S. at 621.

Justice O'Connor, concurring in *Kendrick*, agreed that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (emphasis in original). Justices Kennedy and Scalia, also concurring, stated that the relevant inquiry was whether "funds are in fact being used to further religion," *id.* at 624. There was thus universal agreement that the direct use of government funds to support religious proselytizing -- precisely the situation in the present case -- is unconstitutional. Here, just as in *Kendrick*, no matter how salutary a general benefits program may be, it cannot directly fund religious proselytizing.

Petitioners weakly suggest that *Kendrick* may be distinguished on the ground that there the funded organizations were "grantees to convey the government's own messages." Brief at 28. Nothing in *Kendrick* or in the history or jurisprudence of the Establishment Clause supports such an artificial distinction. This Court's parochial school aid cases contain no hint that funding is improper only if the parochial schools are purveying the government's views. Indeed,

petitioners recognize the fundamental incompatibility of their position with this Court's parochial school aid decisions; thus, they urge the Court to "overrule the principle announced in those cases," which they characterize as a bar on government benefits bestowed "on a neutral basis" to "'pervasively sectarian institutions or 'specifically religious' activities." Br. at 41.[17]

Amici Christian Legal Society, *et al.* also attempt to avoid the thrust of *Bowen v. Kendrick* and other funding cases by arguing that the purposes of the Establishment Clause are not served by excluding religious activities from a general funding program. They describe the Establishment Clause no-funding principle as simply designed to prevent government from endorsing religion or expanding its influence "in a field where that influence should be minimized." Br. at 6-7. But the no-funding principle is not intended merely to foreclose *government* advocacy of religion. An equally fundamental Establishment Clause goal is to protect against direct government support for *private* religious activity.

Petitioners' and *amici*'s purported reconciliation of the conflicting free speech and establishment principles in this

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[17] Petitioners argue in the alternative that this Court's parochial school aid decisions are distinguishable from the present case because they assume that the subsidies involved did not derive from general benefit programs but overwhelmingly favored religion. Br. at 39-40. This is an imaginative but myopic reading of the parochaid cases. Those cases do not turn on a perception of favoritism to religious schools, but on this Court's appreciation of the dangers of administrative entanglement, political divisiveness, coerced tax support in violation of religious conscience, and direct government advancement of religious indoctrination. *See, e.g., Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. at 770-93; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 747-54 (summarizing cases); *Aguilar v. Felton*, 473 U.S. at 409-14; id. at 415-19 (Powell, J., concurring).

case thus winds up eviscerating the Establishment Clause by inviting direct government funding of religious proselytizing and worship. They suggest no limits to their argument that direct tax support for religious indoctrination is proper -- indeed, is constitutionally mandated -- so long as it is even-handed and not equivalent to government endorsement of the beliefs purveyed. Under their interpretation of "neutrality," Congress could -- or indeed, would be obliged to -- appropriate funds for churches anytime it funded other charitable endeavors, and to subsidize religious schools, or school prayer in public schools, anytime it subsidized secular public education.

B. Direct Government Funding for Religious Activity Would Create Serious and Divisive Entanglement Problems

Requiring the University to provide funding for religious groups would also violate the Establishment Clause by creating inevitable entanglement between the University and its students' sectarian activity. University funding decisions are highly discretionary, based on each student group's goals and conduct, its financial self-sufficiency, the extent to which it advances the University's "educational purpose," and "the University-wide benefits conferred by [its] activities." *Rosenberger*, 18 F.3d at 271; J.A. 71. The Religion Clauses of the First Amendment were designed precisely to preclude government from making such inquiries and judgments about the value of particular religious activities or their potential benefits to the populace.

> [There exists an] overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989)(quoting *United States v. Lee*, 455 U.S. 253, 263 (1982)(Stevens, J., concurring)). *See also Larson v. Valente*, 456 U.S. at 255 ("'state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids'")(quoting *Lemon v. Kurtzman*, 403 U.S. at 620); *cf. United States v. Ballard*, 322 U.S. 78 (1944)(government cannot evaluate truth or falsity of religious beliefs).

Under the University's criteria, moreover, the "size of the group" is a relevant funding consideration. Thus, the most popular religion would have a claim to the largest grant. Few prospects are more chilling to religious liberty than such government favoritism to populous, majoritarian faiths. By contrast, in *Zobrest*, *Witters*, and *Mueller*, benefits ultimately accruing to sectarian schools were acceptable because they were incidental, not direct; and individuals, not government, made the choices about which religions to favor.

Nor would the entanglement problems subside once the University's funding decisions were made. University staff examine the finances and operation of each funded group not only during the grantmaking process but on an ongoing basis, to ascertain whether the group's expenses are reasonable and proper. *Rosenberger*, 18 F.3d at 271. Thus, the direct money subsidy here would create a "'relationship pregnant with involvement . . . [which] could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.'" *Lemon v. Kurtzman*, 403 U.S. at 621 (quoting *Walz v. Tax Comm'n*, 397 U.S. at 675).

Finally and, perhaps most ominously, competition for funding among student religious groups would breed political rivalry and strife. It was a primary purpose of the Establishment Clause to prevent competition for government

support among rival religious factions. Now as then, the best guarantee of religious freedom is to keep it free of government entanglement in the form of direct subsidies and the discretionary decisions they require. This Court has recognized that direct government funding of religion presents the greatest danger of sectarian warfare, and that political divisiveness is therefore an appropriate and necessary inquiry where direct funding is at issue. *Bowen v. Kendrick*, 487 U.S. at 617 n.14; *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Mueller v. Allen*, 463 U.S. at 403-04 n.11.

C. Direct Funding Is Significantly Different From Tax Exemption, Access To Public Space, Or Other Incidental and Generally Available Benefits

Petitioners liken the aid sought here to permissible tax exemptions for churches, *Walz v. Tax Comm'n*, or generally available public benefits such as access to meeting space, *Widmar v. Vincent*, or assistance to the handicapped, *Zobrest v. Catalina Foothills School Dist.*; *Witters v. Washington Dep't of Serv. for the Blind*. But direct funding for religion is materially different; it entails discretionary decisionmaking, breeds religious warfare, and coerces individual religious conscience in ways that provision of general benefits does not. As the Court explained in *Walz*, tax exemption is "an indirect economic benefit," in which "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Direct subsidy, by contrast, "would be a relationship pregnant with involvement . . . . The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." 397 U.S. at 674, 675.

Justice Harlan's concurrence in *Walz* explained the difference in terms particularly applicable to this case: "[s]ubsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy . . . ." *Id.* at 699.[18] Justice Brennan, likewise, observed that exemptions and direct subsidies are "qualitatively different" because subsidy involves "direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole," while exemption assists "only passively" and does not "'forcibly divert[] the income of both believers and nonbelievers to churches.'" *Id.* at 690-91 (concurring opinion)(quoting Donald A. Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development, Part II," 81 Harv. L.Rev. 513, 553 (1968)). Justice Scalia, dissenting in *Texas Monthly, Inc. v. Bullock*, embraced this same crucial distinction between passive, incidental assistance and affirmative diversion of government funds to religious activity. 489 U.S. at 43 (also quoting Giannella).

Making public facilities or other benefits generally available to religious as well as secular groups is also not problematic in the way that direct financial subsidies are. Such evenhandedness in the distribution of benefits entails no forced diversion of tax funds, no governmental judgments about the relative value or public benefit of different religious views, no government entanglement in religious groups' administrative affairs, and little or no political divisiveness. As the Court explained in *Widmar*, "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." 454 U.S. at 273. *See also Lynch v. Donnelly*, 465 U.S. 668, 683 (1984).

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[18] He added: "subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case." 397 U.S. at 699.

D. Direct Funding Of Religious Groups Violates The Establishment Clause Independent Of Any Imagined Appearance Of Governmment Endorsement

As the foregoing analysis has shown, direct funding of religious proselytizing contravenes the Establishment Clause independent of any appearance of government sponsorship or endorsement. In addition, the Fourth Circuit held that any University subsidy for "Wide Awake" would violate the Establishment Clause by conveying a message of government endorsement. 18 F.3d at 285-86. In contrast to government-sponsored nativity scenes or school prayers,[19] however, there is no message of endorsement when the government creates a system designed to fund a broad range of expressive activities. Under those circumstances, public funding for a specific expressive activity no more conveys a message of endorsement than does the speech of professors at public universities, the works of artists who receive government grants, the availability of books in public libraries, or the access of any group to a governmentally maintained public forum such as a street or park.

If this were not the case, the entire edifice of First Amendment free speech doctrine would be threatened. Public forum analysis, the principle of viewpoint neutrality in subsidy or benefit programs, the First Amendment protection for diverse ideas afforded to public universities and libraries, and the bar on unconstitutional conditions all depend on an appreciation by the public and by the courts that access to benefits, including funding, is not equivalent to sponsorship or "government speech." This understanding is especially crucial where, as in this case, the government is providing benefits and funding that generally promote expression and intellectual inquiry, and expand the marketplace of ideas. *League of Women Voters*, 468 U.S. at 378-79.

This Court has recognized repeatedly that funding or other benefits, especially in the area of expression, do not necessarily imply endorsement. For example, in *Widmar*, the Court noted:

> [A]n open forum in a public university does not confer any imprimatur of State approval on religious sects or practices . . . . [S]uch a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

454 U.S. at 274 (quoting lower court opinion). The same principle, and its inevitably contextual analysis, applies whether or not the alleged endorsement is religious.[20]

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[19] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668; *Lee v. Weisman*, 112 S.Ct. 2649; *Stone v. Graham*, 449 U.S. 39 (1980); *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. at 2499, (O'Connor, J., concurring)(endorsement analysis is useful in special benefits cases like *Lee*, *Lynch*, *Stone*, and *County of Allegheny*, but is not the only test for Establishment Clause violations).

[20] In this case the standard CIO agreement already states that University benefits "should not be misinterpreted as meaning that [the recipient] organizations are part of or controlled by the University, . . . or that the University approves of the organizations' goals or activities." J.A. 26; *see also* J.A. 27-29, ¶¶2-4 (requiring, *inter alia*, that CIOs state their independence from the University in all written materials). *See League of Women Voters*, 468 U.S. at 395. This is not to say that disclaimers will always be sufficient to avoid Establishment Clause problems where other indicia of government sponsorship exist.

E. Determining When An Activity Is "Religious" and Thus Barred From Direct Funding May Sometimes Be Difficult, But Is Necessary Under The Establishment Clause

Determining whether an activity is "religious" within the meaning of the University's guidelines and, indeed, of the Establishment Clause, will be relatively simple in some circumstances (such as the present case), and more difficult in others, where student publications or organizations present a mix of secular and sectarian speech. The problem of line-drawing in some situations is unavoidable but not insoluble, and in any event is a familiar exercise under both the Free Exercise and Establishment Clauses.

Thus, in *United States v. Seeger*, 380 U.S. 163 (1965), this Court had to define religious belief for purposes of the conscientious objector exemption from the Selective Service law. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court had to distinguish truly religious from secular philosophical beliefs in order to resolve a free exercise claim of exemption from compulsory education laws. In *County of Allegheny v. ACLU*, 492 U.S. at 614 n.60, the Court recognized that Establishment Clause cases commonly require factual inquiry into the nature and meaning of religious symbols. As the Court observed in *Widmar*,

> the Establishment Clause requires the State to distinguish between "religious" speech . . . and "nonreligious" speech . . . . This distinction is required by the plain text of the Constitution.

454 U.S. at 371 n.9.

Bowen v. Kendrick itself provides a useful guide for any government agency that must determine when the Establishment Clause bars direct funding of "religion." If an organi-

zation is "pervasively sectarian," then there is a strong likelihood (if not a certainty) that government funding would unconstitutionally support proselytizing, worship, or other religious activity. *See* 487 U.S. at 609-10; *see also Hunt v. McNair*, 413 U.S. 734, 743 (1973). Similarly, if a publication is engaged in "indoctrination into the beliefs of a particular religious faith," *Kendrick*, 487 U.S. at 611-12, as in this case, then the Establishment Clause prohibits direct funding of that publication. If, on the other hand, a group or journal is primarily secular but occasionally sponsors a discussion including religious perspectives, or publishes some articles reflecting a religious point of view, funding of that group or journal should no more be forbidden than public schools are forbidden from teaching *about* religion simply because they may not mount religious ceremonies or proselytize.

Despite petitioners' attempt to blur the line between "culture" and "religion,"[21] and to persuade this Court that all

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[21] Petitioners exaggerate the definitional problems arising in this case from the University's refusal to fund "religious activities." Brief at 20. The Muslim and Jewish groups whose funding it challenges do not appear, on this record, pervasively sectarian or primarily engaged in religious proselytizing. There is even less evidence in the record that the C.S. Lewis Society engaged in religious proselytizing.

The fact that among the Muslim Students Association's aims is to "promote a better understanding of Islam," J.A. 92, would not in itself qualify the group as pervasively sectarian or proselytizing, although obviously it should not receive funding for any religious activity it might pursue. Whether the association's magazine, "Al Salam," constitutes a religious activity, *see* Pet.Br. at 5 n.2, presents a factual question that may require remand for adjudication of petitioners' equal protection claim. For if it is the case that the University is supporting some religions and not others, then the petitioners' equal protection argument is correct. The remedy, however, would not be to fund all religions, in violation of the Establishment Clause, but to assure that no religious activities at all receive government subsidies.

(continued...)

distinctions in this area are hopelessly subjective and constitutionally dubious, the religion clauses demand that such distinctions be made frequently by government agencies, including public universities and courts. Urging that they are too difficult is essentially an argument for obliterating the Establishment Clause altogether.

[21] (...continued)

In addition, *amici* Christian Legal Society, *et al.* contends that the principle of neutrality requires the University to fund "Wide Awake" because it funds what *amici* describe as a "wide range of non-religious and anti-religious speech." Br. at 11. There are at least two problems with this argument. First, the materials referred to by *amici* are not in the record. Second, the argument proves far too much. If the principle of neutrality required the government to fund religious speech whenever it funded nonreligious speech, then it would also require the government to teach creationism whenever it taught evolution. This Court has already rejected that false symmetry. *See Edwards v. Aguillard*, 482 U.S. 578.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Marjorie Heins
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Stephen B. Pershing
ACLU of Virginia
6 North 6th Street
Richmond, Virginia 23219
(804) 644-8022

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v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, et al.,
Respondents.

On Writ of Certiorari to the
Fourth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

ANTHONY T. CASO
* DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305,
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

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No. 94-329

In the
Supreme Court of the United States
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THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, et al.,
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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance. All parties have consented to the filing of amicus curiae briefs in letters lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the mandatory fees arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). PLF attorneys also represented the students in *Smith v. Regents of University of California*, 4 Cal. 4th 843, *cert. denied*, ___ U.S. ___, 126 L. Ed. 2d 140 (1993).

PLF believes that students must not be coerced into subsidizing views with which they disagree. Such coercion can take the form of the mandatory payment of "activity fees" which are then distributed to various student groups and activities regardless of educational content. PLF emphasizes that *all* groups, regardless of the content of their speech, should have access to campus facilities on an equal basis. On the other hand, no group whose purpose is to espouse a political or ideological (including religious) viewpoint should be entitled to receive financial support from individuals who do not share the views of the group. Universities must not violate the First Amendment speech and association rights of those students who choose not to

subsidize noneducational or only incidentally educational activities.

For the reasons stated herein, the decision of the Fourth Circuit Court of Appeals should be affirmed.

STATEMENT OF THE CASE

The University of Virginia (University) collects from each student a "student activity fee" of $14 per semester. *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 270 (4th Cir. 1994). These fees are collected into the Student Activities Fund, which supports a wide variety of student organizations, activities, and publications at the University. *Id.* The Guidelines established to determine who should receive money from this fund exclude the following expenditures and activities: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities. *Id.* at 271. Thus, the Guidelines are supposed to ensure that the funds are administered "in a manner consistent with the *educational* purpose of the University as well as with State and Federal law." *Id.* (emphasis added).

Wide Awake Productions (WAP) is a group of undergraduates attending the University of Virginia who produce a Christian-oriented publication called *Wide Awake*. *Id.* at 271-72. There is no dispute that the purpose of this magazine is to promote Christian belief among the students at the University. *Id.* at 272-73. Five thousand copies of each issue are distributed free of charge around campus. *Id.* at 272. WAP is recognized as a Contracted Independent Organization (CIO), which grants it access to all campus

facilities, computers, and the right to apply for Student Activities Fund money. *Id.* at 270, 273. WAP requested reimbursement from the Student Activities Fund the cost of publishing the magazine ($5,862). *Id.* at 273. The request was denied by the University because publication of the magazine constituted a "religious activity" as defined by the Guidelines. *Id.* The Guidelines' definition of a "religious activity" is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." *Id.* at 271 n.2. WAP exhausted all its internal appeals. *Id.* at 274. In each denial of the requested funding, the University emphasized that WAP could still print (using campus facilities and equipment) and distribute copies of the magazine on campus. *Id.* at 273-74. The members of WAP then sued the University.

The District Court ruled for the University on the grounds that the Student Activity Fund (SAF) was a nonpublic forum and that the Guidelines were reasonable and did not result in viewpoint discrimination. *Rosenberger v. Rector and Visitors of the University of Virginia*, 795 F. Supp. 175, 180-81 (W.D. Va. 1992). On appeal, the Fourth Circuit affirmed the result of the District Court, but using a different analysis based primarily on the law of prior restraint and the First Amendment Establishment Clause. *Rosenberger*, 18 F.3d at 282-87.

SUMMARY OF ARGUMENT

Universities collecting mandatory student fees from their students must defend the First Amendment rights of freedom of speech and association of those students who do not wish to fund the political and ideological (including religious) agendas of certain student organizations. Thus,

universities have two options. First, universities may implement procedures to rebate the portion of the fees used for noneducational (or only incidentally educational) activities. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986); *Keller v. State Bar of California*, 496 U.S. at 17; *Smith v. Regents of University of California*, 4 Cal. 4th at 862-63. Second, the universities may simply choose to use mandatory student fees to fund only educational activities (or those which do not implicate any political or ideological ideas or activities, *e.g.*, dances) at all. A public university may not use the student fees of dissenters to finance student groups when the educational benefits offered by the groups become incidental to the groups' primary function of advancing their own political and ideological interests. *Smith*, 4 Cal. 4th at 859-60.

By choosing to restrict the use of mandatory fees for only demonstrably educational activities--excluding social, political, philanthropic, and religious activities from funding eligibility--the University of Virginia has layed the foundation for protection of the First Amendment rights of those students who would choose to subsidize only the University's core mission.[1] It has also tried to save itself the annual expense and controversy of attempting to determine which portion of the mandatory student fees must be rebated to dissenting students. Although the Fourth Circuit Court of Appeals did not decide the case on this basis, Pacific Legal Foundation urges this Court to consider

[1] The record in this case is not sufficient to determine whether this policy in fact protects student's First Amendment rights to be free from compelled subsidization of others speech.

the implications of its decision on the First Amendment rights of mandatory student fee payers when reaching its decision.

ARGUMENT

THE CONSTITUTION REQUIRES UNIVERSITIES TO RESTRICT THE USE OF MANDATORY STUDENT FEES TO PROTECT THE FIRST AMENDMENT RIGHTS OF THEIR DISSENTING STUDENTS

Ronald W. Rosenberger and Wide Awake Productions claim a right to have other students subsidize their publication, regardless of whether the other students wish to support the views expressed in the magazine. The Fourth Circuit Court of Appeals did not view this case in this context, choosing instead to analyze the refusal of the University of Virginia to reimburse the costs of producing the publication as a prior restraint. *Rosenberger*, 18 F.3d at 279. Despite the Fourth Circuit's chosen analysis (which led to the correct result), the court below did not adequately examine the implications of the funding source's genesis in mandatory student fees.

The court below notes that the SAF is comprised of mandatory student fees. *Id.* at 270. However, the rights of the students who must supply the money for that fund are never again mentioned. This Court, while affirming the decision below, should ensure that the rights of dissenting students to refrain from funding noneducational or incidentally educational activities with which they disagree remains intact and is not marginalized.

The Fourth Circuit eloquently expressed the difference between being permitted to speak freely, and forcing others to subsidize one's speech:

> While the First Amendment thus represents a guarantee that freedom will be preserved in the face of legislative ambition, it goes no further. Although the Amendment preserves inviolate the individual's *right* to speak, it sustains speech itself only indirectly. The Speech and Press Clause cannot be metamorphosed into a promise that the federal government will purchase a bullhorn, paper, and ink for the convenience of every garrulous member of the American populace.

Rosenberger, 18 F.3d at 277 (emphasis in original). This fundamental principle balances Americans' right to speak with the right of other Americans to be free from coercion to support such speech. This Court, whatever its decision regarding the Establishment Clause issue (on which Pacific Legal Foundation takes no position), must assure that its opinion will not lead to coercive funding of speech with which individuals disagree.

A. Agency Shop Fee and Integrated Bar Cases Demonstrate the Constitutional Requirement That the Government Refrain from Coercing Subsidization of Views with Which One Disagrees

Although this Court has never ruled specifically on the issues of activities funded by mandatory student fees, cases in the agency shop fee and integrated bar context provide a framework for analyzing the appropriate use of mandatory student fees. The constitutional principles ensconced in the First Amendment and, central to this case,

are the freedoms of speech and association. In this case, the principles are inverted: the rights to refrain from speaking or associating.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), this Court held that "the fact that [individuals] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." The nature of these rights are not restricted only to those activities which might be labeled "political."

> [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection. ... Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

Id. at 231-32 (citations omitted). *Abood* involved nonunion public school teachers who were compelled to pay an agency shop fee to the teachers' union. The court upheld the requirement for all teachers in a bargaining unit to support the collective bargaining representative, but ruled that the Constitution was violated if nonmembers were compelled to pay for political or ideological activities that were unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36.

These same principles were held to apply to attorneys who are forced, by state law, to belong to and pay dues to

a bar association in *Keller v. State Bar of California*, 496 U.S. 1. In *Keller*, this Court dismissed arguments that the Bar was not bound by prior case law concerning compelled union dues. The Bar had argued that the union fee cases should be distinguished from compelled bar dues on the grounds that the Bar assertedly served a more substantial public interest than the union's private economic interest. *Id.* at 13. This Court replied that

> legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Id. (citations omitted). This Court then announced the guiding standard for determining challenges to the Bar's expenditures: "[W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14.

Keller was followed by *Lehnert v. Ferris Faculty Association*, 500 U.S. 507. In that case, a plurality of this Court formulated a three-part test to be used in compulsory fee challenges. This Court ruled that an expenditure is chargeable to dissenters if (1) it is germane to the activity for which compelled fees are permissible; (2) it is justified by the government's vital policy interest that justified the compelled fees; and (3) it does not significantly add to the burdening of free speech already occasioned by the compelled fee. *Id.* at 518.

All of these cases were extremely important vindications of the rights of Americans to refrain from speaking or associating with speakers who advocate ideas with which they disagree. The facts of the *Lehnert* case in particular demonstrate why these principles must be applied with equal vigor in the mandatory student fee context. The plaintiffs in *Lehnert* were state college professors who paid agency shop fees to the faculty union. Upon their challenge to the union's practice of using compelled fees for all union activities, including lobbying, this Court held that the professors could not be compelled to subsidize any activities outside the limited scope of contract ratification or implementation, even matters as closely related to the union's interests as taxes for the support of public education. *Lehnert*, 500 U.S. at 520, 526. The symmetry of public university professors and the students they instruct in relation to the same First Amendment rights requires the same vigilance in protecting those rights for both groups. Although this Court had never specifically addressed the issue of mandatory student fees, lower courts have relied on the cases described above in analyzing such student fee cases. *See, e.g., Smith v. Regents of University of California*, 4 Cal. 4th at 852-65; *Carroll v. Blinken*, 957 F.2d 991, 996-97 (2d Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 224 (1992); *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985).

B. Mandatory Student Fees Must Be Used Either Exclusively for Educational Activities or the University Must Rebate the Amount of the Fee Used for Noneducational Activities to Dissenters

The California Supreme Court decision in *Smith v. Regents of University of California*, 4 Cal. 4th 843, dramatically points out the difficulties a university encounters when it does not forbid the use of mandatory fees for

noneducational purposes. In that case, the state Supreme Court ruled that the University of California could not constitutionally fund *all* activities, no matter how political, with mandatory student funds. *Smith*, 4 Cal. 4th at 853.

Smith involved the use of mandatory student activity fees to fund, among other things, campus organizations that engaged in political or ideological activities. The California Supreme Court held that dissenting students could *not* be coerced to pay fees for such programs espousing views the students opposed: "[T]he constitutional guaranties of free speech and association do not permit the state to make speech a matter of compulsion and coercion." *Smith*, 4 Cal. 4th at 848. In reaching its decision, the court recognized the two conflicting principles vying for supremacy in the case. First, the government may not compel a person to contribute money to support political or ideological causes. *Keller*, 496 U.S. at 9-10; *Abood*, 431 U.S. at 234-35; *Smith*, 4 Cal. 4th at 852. Second, the University requires considerable discretion to determine how best to carry out its educational mission. *Smith*, 4 Cal. 4th at 852.

Several pronouncements of the California high court bear strongly on this case. First, the court reaffirmed the principle that in First Amendment compulsory fee cases, courts must apply strict scrutiny to the programs which implicate the dissenters' rights.

> Because the use of a mandatory fee implicates freedom of association, strict scrutiny applies. ... [E]ven when the government has a sufficiently compelling interest to require a person to subsidize an organization against his or her will, the resulting burden on freedom of association

> "requires that the procedure be carefully tailored to minimize the infringement."

Id. at 853 (citations omitted).

> Thus, under *Lehnert*, even if the state has a sufficiently compelling interest to require unwilling persons to support an organization financially, the state may not compel support for lobbying efforts except on those matters that are strictly necessary to further the interest that justified the requirement of support.

Id. at 866.

The principles described above demonstrate the constitutional mandate which requires the University of Virginia to use mandatory fees to fund only those activities which further the school's educational mission. By funding only "educational" activities, the University insulates itself from lawsuits by dissenting students who disagree with the messages propounded by various noneducational or incidentally educational groups on campus. As the funding decisions would be subjected to strict scrutiny, the University runs a very high risk of incurring liability to dissenting students. *See* La Fetra, *Recent Developments in Mandatory Student Fee Cases: Carroll v. Blinken and Smith v. Regents of University of California*, 10 J. of L. and POL. 579 (1994).

The California Supreme Court recognized the great impact of *Keller* on mandatory dues cases, be they in the context of students, unions, or integrated bars. The *Smith* court interpreted this Court's cases as

> [making] clear that the use of mandatory contributions must be "germane," not simply to any purpose the organization chooses to declare for itself, but "to the purpose for which compelled association was justified" as a matter of constitutional law. [Citing *Keller*.] In other words, the existence of a compelling interest sometimes permits the state to require a person to associate with an organization, or to support it financially, despite the general constitutional prohibition against laws with that effect. However, that one's support may be compelled for some purposes does not mean that one must also subsidize every activity the organization in question chooses to undertake.

Id. at 854 (citations omitted).

Given, then, that the University of California could not extract money from its students to fund political and ideological activities with which they disagree, the question became what should the University do to avoid the constitutional infirmities? The California Supreme Court found that if the University was to continue funding political and ideological activities from the student activity fund, the University must implement the procedures announced by the Court in *Chicago Teachers Union v. Hudson*, 475 U.S. at 301-10, and adopted in *Keller v. State Bar of California*, 496 U.S. at 16-17. These procedures require "'an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.'" *Keller*, 596 U.S. at 16; *Smith*, 4 Cal. 4th at 862-63. These procedures culminate in the reimbursement to dissenters of

the amount of the fee used in violation of the dissenters' constitutional rights. However, if the University refuses in the first place to subsidize political and ideological activities through mandatory fees, it does not have to provide a refund, thus obviating the need for the procedures just described. *Id.*

As applied in this case the University of Virginia's policies avoid the constitutional misuse of mandatory student funds by restricting the eligibility of activities to receive the funds to those which had only educational purposes. When mandatory fees are restricted to support those student groups whose educational purpose has not become merely incidental to the groups' primary function of advancing their own political and ideological interests, the First Amendment rights of dissenting students are protected. *Smith*, 4 Cal. 4th at 859. Wide Awake Productions cannot force the University to violate the rights of dissenting students who must contribute to the Student Activity Fund.

CONCLUSION

As this Court has held, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Keller*, 496 U.S. at 10. These words of Thomas Jefferson should be implemented by Jefferson's own university, the University of Virginia. This Court should assure that dissenting students at the University will continue to be protected from coerced

subsidization of speech with which they disagree. For the foregoing reasons, the decision of the Fourth Circuit Court of Appeals should be affirmed.

DATED: January, 1995.

Respectfully submitted,

ANTHONY T. CASO
* DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305,
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

No. 94-329

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In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AMERICAN JEWISH CONGRESS, UNION OF AMERICAN HEBREW CONGREGATIONS, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., PEOPLE FOR THE AMERICAN WAY, AND NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel

ELLIOT M. MINCBERG
MELISSA ROGERS
DAVID SAPERSTEIN
LOIS C. WALDMAN

Counsel of Record

J. BRENT WALKER
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 Maryland Ave., NE
Washington, DC 20002
(202) 544-4226

OLIVER S. THOMAS
NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.
1111 Melvin Ave.
Maryville, TN 37803
(615) 977-9046

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QUESTION PRESENTED

Whether a substantial grant of governmental funds to a religious student organization to pay for an indisputably religious publication would violate the Establishment Clause and the principle of governmental neutrality contained therein.

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INTEREST OF AMICI CURIAE

Amici joining this brief represent a broad segment of the religious, educational and civil liberties communities. We strongly support freedom of speech and press and the free exercise of religion. We likewise support the right of "equal access" of students in the public schools and in colleges and universities. We also have argued for the right of churches to evening and weekend use of school facilities on an equal footing with other community groups. However, we are adamant in our opposition to attempts to obtain state funds to pay for the exercise of those rights. "Equal access" does not carry with it the right to "equal advancement" under this Court's Establishment Clause jurisprudence. Hence, we file on behalf of Respondents in this case, not because we oppose student religious speech, but because the First Amendment rightly forbids the state to pay for it.

In this brief, *amici* focus exclusively on the Establishment Clause issues -- leaving the task of briefing other issues in this case to the parties and other *amici*.

A Statement of Interest of each amicus is attached as Appendix A.

SUMMARY OF ARGUMENT

Religion is different. The framers said so by including two religion clauses in the First Amendment. The Establishment Clause and the Free Exercise Clause, taken together, require government to be neutral toward religion -- neither advancing nor inhibiting it, but setting it free to flourish or founder on its own.

The conviction that government should be neutral in matters of faith originated not with James Madison and Thomas Jefferson, or even with John Locke, but with a fundamentalist preacher, Roger Williams. Williams, who founded Rhode Island as a haven for conscience, spoke of the need for a "hedge or wall of separation between the garden of the church and the wilderness of the world." For Williams, governmental neutrality toward religion was essential to the maintenance of a robust church and a healthy government. Colonial Baptists and other dissenting faiths, particularly in Virginia, carried Williams' vision forward and provided most of the grassroots support for disestablishment and eventually for the religion clauses in the First Amendment.

Religion must be treated differently. The Free Exercise Clause, at times, requires that religion be granted special accommodation. Conversely, the Establishment Clause sometimes imposes special limitations. One is the stern prohibition against the use of public funds to advance religious doctrine. Although the government may subsidize private speech and activities, it may not subsidize religion. This principle is grounded in the sound public policy that religion should be voluntary and that religion fares best when freed from governmental assistance and control.

This Court has long recognized the wisdom of the model advanced by Madison, Jefferson and Colonial preachers and incorporated by them into the Bill of Rights. The Court

repeatedly has affirmed the principle that public funds should not be used to advance or to inhibit religion. Only when government funds are provided to individuals who then choose on their own to use them for religious purposes has the Court recognized exceptions to the no-funding rule. In no instance has the Court been willing to permit -- much less require -- a state to provide a direct cash subsidy to an unabashedly religious organization for an admittedly religious purpose.

What Petitioners seek is not "equal access" but "equal advancement." Providing equal access is not only permitted by the Establishment Clause, it is often required by the Free Speech Clause. But subsidizing a religious message amounts to an impermissible advancement of religion -- even when equally available to non-religious recipients.

When the government pays the bills, it is no longer granting access, it is actually advancing the religious message. It is no longer removing a governmentally-imposed burden on religious speech; it is directly supporting the religious communication itself. It is no longer getting out of religion's way; it is getting behind to push.

A substantial grant of governmental funds to a sectarian organization to finance the publication of a religious message is contrary to the principle of governmental neutrality and violates the Establishment Clause.

ARGUMENT

I. THE HISTORIC PRACTICE OF DENYING STATE FUNDS TO SUPPORT RELIGIOUS SPEECH AND ACTIVITIES PROTECTS RELIGION FROM THE HARMFUL EFFECTS OF GOVERNMENTAL INVOLVEMENT

The fact that this case arises from Virginia, the cradle of religious liberty, infuses the proceedings with the dramatic irony that might be found in a novel. Virginia is the stage where Colonial free-church Christians challenged the established church on the grounds that it was morally wrong to tax citizens to promote particular religious opinions.[1] Virginia is the backdrop for James Madison's *Memorial and Remonstrance Against Religious Assessments*, a powerful missive that successfully scuttled Patrick Henry's attempt to tax citizens to pay for the teaching of Christianity.[2] Virginia is the venue of the university founded by Mr. Jefferson himself -- the fiercest advocate of the separation of church and state of all the founders.

These Colonial forebears would be horrified to see the constitutional mischief Petitioners -- however well-intentioned -- seek to accomplish by asking government to pay for their religious speech and activities. Mr. Jefferson would say "no." He would tell us that, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves

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[1]*See generally* Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 134-48 (Oxford University Press 1986).

[2]James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947).

and abhors, is sinful and tyrannical."[3] He further would remind us, as did the Fourth Circuit, that while "schools" of religion were to be granted access and allowed "on the confines of the University," the University did not thereby commit itself to build their schools for them.[4]

Mr. Madison also would oppose state-funded religion -- whether through Patrick Henry's General Assessment Bill or through the expenditure of student activities funds to publish a religious periodical. In his *Memorial and Remonstrance*, Madison warned that not even "three pence" of one's property should be used "for the support of any one establishment," because the same authority may require the citizen to support another with which he disagrees.[5] Madison was convinced that such an assessment "is not requisite for the support of the Christian religion," but contrary to it since "every page of it disavows a dependence on the powers of this world."[6] Instead, those who would propagate religion should turn to "voluntary rewards of their flocks."[7]

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[3]Thomas Jefferson, *A Bill for Establishing Religious Freedom, reprinted in* Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* Appendix. A. (4th ed., Markham Press Fund of Baylor University Press 1992).

[4]*Rosenberger v. The Rector and Visitors of the Univ. of Virginia*, 18 F.3d 269, 284 (4th Cir. 1994) (citing 19 *The Writings of Thomas Jefferson* 408 (A. Bergh ed., 1905) (report of the Rector to the University Visitors dated October 7, 1822)).

[5]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 65-66.

[6]*Id.* at 67.

[7]*Id.* at 68.

Not to be outdone by the Anglican Madison, Virginia Baptists organized a General Committee to trumpet a similar note in opposition to the General Assessment Bill:

> [I]t is believed to be repugnant to the spirit of the gospel for the legislature thus to proceed in matters of religion; that the holy author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support; that it has made and will again through divine power make its way against all opposition; and that *should the legislature assume the right of taxing people for support of the gospel it will be destructive to religious liberty.*[8]

In short, as Professor Douglas Laycock, counsel for some of Petitioners' *amici*, has observed: "[The Framers] rejected all taxes [to support religion] . . . . The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere."[9]

Amici, like the founders, do not oppose governmental promotion of religious speech and activities because we wish religion ill. To the contrary, we want to protect religion from the harm that occurs when the gears of church and state are allowed to mesh. At least from the time that Constantine made Christianity the official religion of the Roman Empire, when church and state have come together, the alliance has been an

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[8]This "Formula Petition" is reprinted in William R. Estep, *Revolution Within the Revolution* 193 (William B. Eerdmans Publishing Company 1990) (emphasis added).

[9]Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 923 (1986).

"unholy" one. It is an axiom of church-state relations that the secular dilutes the sacred when the two are put under common control. Roger Williams, who founded Rhode Island as a haven for conscience after his banishment from Massachusetts Bay, understood this reality existentially. He called for a "hedge or wall of separation between the garden of the church and the wilderness of the world."[10]

It matters not that the state's motives are ostensibly pure. As the Colonial Virginia Baptist preacher, John Leland, once exclaimed, "Experience . . . has informed us, that the fondness of magistrates to foster Christianity, has done it more harm than all the persecutions ever did."[11] And, Jefferson, in his Bill for Establishing Religious Freedom, noted the futility of government's efforts to aid religion because:

> [I]t tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way . . . .[12]

Madison also railed against the general assessment to

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[10]Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* 207 (William B. Eerdmans Publishing Company 1991).

[11]Edwin S. Gaustad, *A Disestablished Society: Origins of the First Amendment*, Vol. XI A Journal of Church and State 409, 414 (1969) (quoting *The Writings of the Late Elder John Leland* 278 (L.F. Greene, ed., Arno Press 1970) (1845).

[12]Jefferson, *A Bill for Establishing Religious Freedom, reprinted in* Miller and Flowers, *supra*.

promote Christianity because the measure "implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an *unhallowed perversion of the means of salvation.*"[13]

Petitioners are wrong when they claim Madison opposed the General Assessment Bill only because it was to be applied unequally and was "imposed for the *sole* purpose of fostering religion."[14] To the contrary, Madison was unalterably opposed to the assessment in principle.[15] It is true that, in his *Memorial and Remonstrance*, Madison notes that certain religious sects -- "Quakers and Menonists" -- were given exemptions not afforded to other religious groups.[16] But Madison worried about this unequal treatment because he wanted *all* sects exempted. Opponents of the assessment did not want "*any* form of financial aid to churches."[17] Moreover, the assessment did not benefit just religion. Virginia taxpayers were allowed to direct their share to "schools" instead of churches.[18]

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[13]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 67 (emphasis added).

[14]Pet. Brief at 37.

[15]*See generally* William Lee Miller, *The First Liberty: Religion and the American Republic* 101-03 (Paragon House Publishers 1988) (1985).

[16]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 66.

[17]Laycock, *"Nonpreferential" Aid to Religion, supra*, at 899 (emphasis added).

[18]*Id.* at 897.

By demanding a subsidy from the University's coffers, Petitioners invite a continuing, dependent and harmful alliance with the state. While Petitioners currently regard this as a boon, it is potentially an intrusive burden. What government funds, government may control. Despite Respondents' current hands-off policy with respect to student groups and publications, there is the ever present possibility that the University could assert numerous requirements or controls.

To all this Petitioners may well reply, "We will risk it. Don't go making our choices for us!" But the risk is not theirs alone to take; nor is the choice made for them only. A decision in Petitioners' favor would create a precedent that will affect others and undercut protections for religion from government that the separation of church and state was designed to ensure. The denial of funding may feel "hostile" to Petitioners, but the protections afforded by the no-funding principle will permit them, and all persons of faith and religious entities, to escape the monitoring, direction and control of government agencies.

Our ancestors who fought so passionately for religious liberty are precisely the ones who steadfastly resisted state assistance to help propagate those religious opinions. As a result of their insistence that the state set the church free, religion has thrived, and the state has been relieved of the daunting task of making decisions about religion -- something it does poorly. This is the genius of the American experiment in religious liberty. The separation of church and state has resulted in a vital constitutional democracy envied by the whole world and a robust religious landscape the likes of which history has rarely witnessed.

In sum, it is critically important that government resist the temptation, in Jefferson's words, to "lay bait in [the] way" of those who would accept the bribe of "worldly honours and emoluments." Respondents have successfully done so here. The Fourth Circuit, to its credit, has refused to compel Respondents to do otherwise.

II. THIS COURT'S ESTABLISHMENT CLAUSE CASES ARE CONTRARY TO PETITIONERS' CLAIM FOR STATE FUNDS TO FINANCE THEIR RELIGIOUS SPEECH AND ACTIVITIES

Not only does the weight of historical opinion favor Respondents' position, this Court's Establishment Clause jurisprudence requiring governmental neutrality toward religion also demands affirmance of the Fourth Circuit's decision.

Amici generally endorse the test embodied in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that has guided the Court's Establishment Clause decisions for over two decades. Though not a perfect formulation, it has worked well to ensure that government neither advances nor inhibits religion nor becomes excessively entangled in religious affairs. Recently, in *Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct. 2141 (1993), this Court relied on *Lemon* to dispose of the Establishment Clause issue. And, while Justice O'Connor questioned the use of *Lemon* as a "Grand Unified Theory," she nonetheless noted that "abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it." *Board of Educ. v. Grumet*, ____ U.S. _____, 114 S. Ct. 2481, 2498, 2500 (1994) (O'Connor, J., concurring in part and concurring in the judgment).[19]

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[19]Petitioners argue that applying Justice O'Connor's "endorsement" analysis to this case improves their position. Pet. Brief at 34-36. The endorsement test may be helpful in cases involving symbolic governmental speech, *see, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), but it no more serves as a "Grand Unified Theory" than does *Lemon*. The endorsement test is particularly

Whether *Lemon* is used by name to decide cases is less important than ensuring the neutrality principle it embodies. While not relying expressly on *Lemon* in other cases, this Court has made clear that the neutrality principle remains its guiding light. Justice Souter, writing for the Court last term in *Board of Education v. Grumet*, observed that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." *Id.* at 2487 (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)). To shed further light on this principle, Justice Souter referenced "the wholesome 'neutrality'" described in *Lemon*'s doctrinal ancestor -- *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). *Id.* at 2488. The Court in *Schempp* stated:

> The wholesome "neutrality" [toward religion] of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. 374 U.S. at 222.

This Court's historic understanding of neutrality does not mean that religion must always be treated the same as secular pursuits. To the contrary, it often requires that religion be treated differently.[20] A "formal" or strict view of neutrality, in contrast, levels the Establishment Clause and deprives it of any

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ill-suited to cases such as this where the government is asked to fund and therefore to directly advance religion.

[20]*See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

real meaning. Indeed, this Court in *Grumet*, observed that "[o]ur cases leave no doubt that in commanding neutrality the religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Grumet*, 114 S. Ct. at 2492. And, in his concurring opinion in *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649 (1992), Justice Souter aptly stated that the government's mandate to "remain neutral in matters of religion does not foreclose it from ever taking religion into account." *Id.* at 2676.

"Taking religion into account," or true substantive neutrality, is reflected in the Court's religion clause cases -- some of which accord special accommodation to religion and some of which impose special limitations. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), illustrates an instance in which the Constitution requires that religion be granted special consideration. Conversely, decisions such as *Lemon*, and *Committee for Public Education & Religious Liberty v. Nyquist*, illustrate instances in which the Establishment Clause imposes special limits on the government's relationship to religious speech and activities.

Congress also has felt constrained at times to impose special limits on religious speech and activities to maintain a posture of governmental neutrality. In drafting the Equal Access Act, certain restrictions were placed on religious clubs that were not imposed on other non-curriculum related student clubs. 20 U.S.C. §§ 4071 - 72 (1988). For example, a teacher or sponsor may actively participate in, and even lead, most student clubs. But with respect to religious clubs, teachers serve as classroom monitors and may be present only in a "nonparticipatory capacity." 20 U.S.C. § 4071(c)(3).[21] Along the same lines, in passing the Child Care and Development Block Grant Act 42

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[21]The Equal Access Act is constitutional. *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

U.S.C. §§ 9858 - 9858q (Supp. V 1993), Congress imposed unique strictures on religious organizations that accept child care block grant funds. Recipients are prevented from using the aid for "any sectarian purpose or activity" or from discriminating on the basis of religion. *Id.* §§9858k(a) and 9858l(a).

In terms of the Free Exercise Clause, Congress has seen fit to "take religion into account." It has given churches and religious organizations a partial exemption from Title VII of the Civil Rights Act, allowing them to discriminate on the basis of religion. 42 U.S.C. § 2000e-1 (Supp. V 1993). Congress recognized that, while secular employers may be prohibited from discriminating on the basis of religion, such a prohibition would be inimical to the mission of churches, synagogues and other religious institutions.[22] How, for example, could a Catholic university advance its own purpose and mission if it were forced to employ non-Catholics in its school of theology? Finally, this substantive understanding of neutrality informed the Congress' passage of the Religious Freedom Restoration Act, requiring the government to demonstrate a compelling interest before it would be allowed to substantially burden someone's exercise of religion. 42 U.S.C. § 2000bb (Supp. V 1993).

Substantive neutrality requires that religion be treated differently under both clauses. Indeed, Professor McConnell himself emphatically agrees: "My position is that the government must 'single out' religion in *both* free exercise and establishment contexts, with the goal of approximating a substantive neutrality in a religiously pluralistic culture."[23] In

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[22]This difference in treatment was unanimously upheld against an Establishment Clause challenge in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

[23]Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 719 (1992).

some cases this may seem to advantage religion when free exercise exemptions are granted, and sometimes it may appear to disadvantage religion when "benefits" are denied under the Establishment Clause. But, in fact, it always serves to keep government in a neutral position *vis-a-vis* religion.

Petitioners and their *amici* want the benefits of the Free Exercise Clause, but not the limits of the Establishment Clause. Most of Petitioners' *amici* have criticized the formal neutrality espoused by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and supported passage of the Religious Freedom Restoration Act. But they are quite willing to embrace a formal concept of neutrality when it suits them under the Establishment Clause.

For purposes of maintaining substantive neutrality and ensuring a robust application of the Establishment Clause, the Court has long held that religion is not entitled to governmental subsidies even though its secular counterparts receive them. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Nyquist*, 413 U.S. 756. As Professor A. E. Dick Howard has observed, cases dealing with the use of public funds to advance a religious perspective raise "core establishment concerns."[24] Justice O'Connor has flatly concluded that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. at 623 (O'Connor, J., concurring).

This Court's cases dealing with aid to colleges and universities are particularly instructive. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court upheld the issuance of revenue bonds for projects at a religiously affiliated Baptist college and set forth

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[24]A. E. Dick Howard, *The Supreme Court and the Serpentine Wall, in The Virginia Statute for Religious Freedom* 337 (Merrill D. Peterson & Robert C. Vaughn eds., Cambridge University Press 1988).

the general rule:

> [Government] aid normally may be thought to have a primary effect of advancing religion [and therefore be unconstitutional] when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission *or when it funds a specifically religious activity in an otherwise substantially secular setting*. *Id.* at 743 (emphasis added).

Thus, either the pervasively sectarian nature of the institution or the religious character of the funded activity disqualifies the college from receiving aid. This Court upheld the grant in *Hunt*, but only because the college was non-sectarian and the funds were not to be used for a religious purpose. *Accord Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (aid in the form of non-categorical grants upheld because the college was not pervasively sectarian and there were strictures against religious use of the money); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal grants for construction of academic facilities approved, but only to the extent that the funds could not be used for sectarian facilities or the advancement of religion).

Petitioners urge this Court to take a position directly contrary to the teachings of *Hunt*, *Roemer* and *Tilton*. They seek student activity funds to accomplish precisely what these cases condemn -- the transfer of public funds to a religious organization to finance a sectarian message. In fact, Petitioners are doubly disqualified. Their organization is indisputably sectarian and *Wide Awake* is without a doubt a religious publication.

If Petitioners succeed in their argument that a government agency choosing to subsidize some speech and activities must do the same for religious activities, these precedents -- as well as true governmental neutrality toward religion -- will be undermined. For example, if a high school pays for a faculty

member to sponsor the chess club, it could be argued that the school must do the same for a religious club -- even though prohibited by the Equal Access Act. Similarly, if unrestricted grants are given to some private colleges and universities (such as Stanford or Harvard), they would have to be given to others (like Bob Jones University) who wish to use their grants to promote a particular religion. Finally, the numerous provisions in federal law that prohibit proselytizing in subsidized social service programs would be called into question. *E.g.*, National Service Trust Act, 42 U.S.C. § 12584(a)(4)(E)(Supp. V 1993).

This Court's decision in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), also does not support Petitioners. In *Witters*, the Court upheld state financial vocational assistance to a blind student who was attending a Christian college and studying to become a minister. The case did not involve a grant paid directly to a pervasively sectarian college. If it had, the result would have been different. The Court wrote that, "the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487. In her concurring opinion, Justice O'Connor emphasized that the aid was permissible precisely because it was to an individual -- not to a religious institution. *Id.* at 493. The student who received the aid in *Witters* made an independent choice to use the money to defray tuition at a religious college. The benefit conveyed was, first and foremost, to the individual, and any benefit to the religious college was indirect and incidental to the individual choice. *Id.* at 488.

The instant case is not one in which a student receives public funds and chooses to purchase a religious magazine as Mr. Witters chose to purchase his education at the Inland Empire School of the Bible. It involves an attempt to extract from the state a direct cash subsidy to Wide Awake Productions to publish the magazine itself. A comparable situation in *Witters* to that of Petitioners here would have been presented if Mr. Witters had been the president of the Bible college and sought an unrestricted

government grant to promote its religious agenda.

Nor does the Court's decision in *Zobrest v. Catalina Foothills School District*, ____ U.S. ____, 113 S. Ct. 2462 (1993), support Petitioners. In *Zobrest*, this Court held that the Establishment Clause was not violated when the government provided funds under the Individuals with Disabilities in Education Act (IDEA) to pay for a sign-language interpreter to assist a deaf student in attending school. The Court noted, that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries." *Id.* at 2469.

Giving Mr. Zobrest funds to pay for an interpreter was tantamount to buying him a mechanical hearing aid. He then chose to attend a parochial school where that assistance would be used to facilitate his learning. Thus, *Zobrest* is the quintessential "student benefit" theory case in the line of *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968). If the state of Arizona had provided aid directly to Salpointe Catholic High School for the printing and publishing of a brochure disseminating its religious point of view, then, but only then, would *Zobrest* be analogous to this case. Additionally, the aid in *Zobrest*, according to this Court, did not relieve the school of "an expense that it otherwise would have assumed in educating its students," and "no funds traceable to the government ever [found] their way into sectarian schools' coffers." *Zobrest*, 113 S. Ct. at 2469, 2467-68. Here, it is beyond dispute that the grant would have gone into the coffers of Wide Awake Productions and defrayed the expenses of publishing religious material.

Finally, the Court's decision in *Bowen v. Kendrick*, 487 U.S. 589, is controlling. In *Bowen*, the Court entertained an Establishment Clause challenge to the Adolescent Family Life Act (AFLA) that authorized Federal grants to organizations, including religious ones, to promote sexual abstinence among

teenagers. Although refusing to strike down AFLA on its face, the Court ruled that it would not tolerate such funds going to a pervasively sectarian institution or to promote religious doctrine. The four dissenting justices would have disqualified even religiously affiliated agencies that were not pervasively sectarian from receiving public funds. *Id.* 487 U.S. at 625 (Blackmun, J., dissenting). Justices Kennedy and Scalia would have permitted pervasively sectarian agencies to participate, but only if the money was not "used to further religion." *Id.* at 624 (Kennedy, J., concurring). And, as pointed out above, Justice O'Connor explained that, "*any* use of public funds to promote religious doctrine violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring). In short, no member of the *Bowen* Court was willing to permit a direct cash grant to a sectarian entity for a decidedly religious purpose.[25]

Yet that is exactly what Petitioners seek in this case. Wide Awake Productions is unabashedly religious and *Wide Awake* articulates an indisputably religious message. Petitioners cannot prevail in this case without doing irreparable violence to the salutary teaching of *Bowen* and numerous other bright line

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[25]Petitioners attempt to distinguish *Bowen* by claiming that it is only when private organizations receive government funds to act as "conduits for government messages" that "government is under an obligation to ensure that the grantees do not teach or promote religion." Pet. Brief at 28. Petitioners conclude that when the government generally funds a variety of speech activities, the Establishment Clause is not violated if the aid is used to fund religious speech. *Id.* The Court expressed no such distinction in *Bowen*. Indeed, whether the grantee of government funds is a "conduit for a government message" has been inconsequential to the Court's interpretation of the Establishment Clause. *See, e.g., Hunt*, 413 U.S. 734 (revenue bonds); *Roemer*, 426 U.S. 736 (non-categorical grants). The government may not grant funds in a manner that advances religion, regardless of whose message is spoken.

decisions of the Court. As noted by the joint opinion of Justices O'Connor, Kennedy and Souter, in *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2808 (1992), "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The First Amendment will be well-served by adherence to precedent in this case.

III. THE CONSTITUTION GUARANTEES EQUAL ACCESS FOR STUDENT RELIGIOUS SPEECH, NOT EQUAL ADVANCEMENT

Petitioners seek to extricate themselves from the binding effect of settled precedent by couching their argument in terms of "equal access" to speak and publish a religious message. This argument, although facially appealing, mischaracterizes the issues here.

This is not an equal access case. Unlike the high school students in *Board of Education v. Mergens*, 496 U.S. 226, the college students in *Widmar v. Vincent*, 454 U.S. 263 (1981), and the church in *Lamb's Chapel*, 113 S. Ct. 2141, Petitioners have not been denied access to campus facilities. Wide Awake Productions has access to the same facilities and forum as other student groups. Nor has the University sought to muzzle the students' speech or publication. But, as the Fourth Circuit observed, the request for "[d]irect monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color." *Rosenberger*, 18 F.3d at 286.

What Petitioners seek here is not equal access, but equal advancement. Providing equal access for religious speech is not only generally permissible under the Establishment Clause, but often required by the Free Speech Clause. Subsidizing the religious message in such a forum is not. While the Constitution

permits the government to subsidize many types of speech and activity, it may not subsidize religion or forces hostile to religion.[26]

This Court drew the distinction between access and advancement clearly in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327. Justice White, writing for the Court (including Chief Justice Rehnquist and Justices Stevens and Scalia), upheld a legislative exemption for religious organizations under Title VII and observed:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. *Id.* at 337.

And in *Mergens*, 496 U.S. at 250, Justice O'Connor, in upholding the Equal Access Act, noted the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

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[26]The University may no more fund anti-religious speech than it may fund religious speech. Thus, if the *Yellow Journal* is actually hostile to religion, it also should be ineligible for state funding. The remedy for an alleged constitutional wrong should not be another constitutional wrong as sought by Petitioners, but rather denial of funding to all activities whose primary effect is to advance or inhibit religion. This would include the Jewish Law Students Association and the Muslim Students Association to the extent that they are engaged in activities that advance religion, even if their message is not highly sectarian or proselytizing.

The difference between access and advancement is paralleled and confirmed by this Court's decisions concerning the constitutionality of tax exemption and deductions. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court upheld a New York real property tax exemption for religious and charitable organizations against an Establishment Clause challenge. While acknowledging tax exemption as an "indirect economic benefit," the Court ruled that the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 674, 675. In his concurring opinion, Justice Brennan noted the difference between prohibited general subsidies and permissible tax exemption:

> A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes . . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy. *Id.* at 690-91 (footnote omitted).

Along those same lines, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld state income tax deductions for expenses incurred in sending children to school. Then-Associate Justice Rehnquist, writing for the majority, quickly acknowledged that, "[t]he Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches," but concluded that the clause does not "encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue . . . ." *Id.* at 400.

Though the difference between access and advancement is

sometimes hard to trace, as Justice O'Connor recognized in her concurrence in *Amos*, 483 U.S. at 347, it is not hard to pinpoint here. When the government pays the bills, it is no longer granting access, it is actually advancing the religious message. It is no longer removing a governmentally-imposed burden on religious speech; it is directly supporting the religious communication itself. It is no longer getting out of religion's way; it is getting behind to push.

If the Establishment Clause does not forbid these practices, little is left of it.

CONCLUSION

It is wrong -- morally and constitutionally -- to force students at the University of Virginia to support any publication that has a primary effect of advancing or inhibiting religion. The fact that the state is permitted to subsidize other speech and activities does nothing to eliminate the Establishment Clause's wise barrier to cash subsidies for religious speech and activities.

Amici respectfully request this honorable Court to affirm the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

J. Brent Walker
Baptist Joint Committee
on Public Affairs
200 Maryland Ave., NE
Washington, DC 20002
(202) 544-4226

Oliver S. Thomas
National Council of Churches
of Christ in the U.S.A.
1111 Melvin Ave.
Maryville, TN 37803
(615) 977-9046

APPENDIX A

INTEREST OF AMICI CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the United States of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council. This brief implements the Council's long-standing commitment to religious liberty and its political corollary, the separation of church and state.

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the

civil, political, economic and religious rights of American Jews. It has taken a particular interest in the Establishment Clause, because in its view the separation of church and state is an indispensable safeguard for the religious liberty of American Jews. AJCongress is equally committed to the Constitutional principle of free expression, nevertheless it does not believe that that principle requires the direct funding of religious speech.

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

Hadassah, the Women's Zionist Organization of America, Inc., has been committed to the principles of religious liberty and the separation of church and state since its inception 81 years ago. Hadassah believes that these constitutional principles are the bedrock of our democratic system. Hadassah has joined prior briefs in support of this position and does so again in the belief that state financing of religious speech and activities undermines these vital constitutional principles.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty, freedom of expression, and

separation of church and state. People For has opposed restrictions on access by religious groups in cases such as *Lamb's Chapel*, where consistent with the Establishment Clause, while vigorously defending church-state separation as vital to religious liberty. People For has joined in filing this *amicus* brief to help vindicate the important First Amendment principles at stake in this case, particularly the principle that government must remain neutral toward religion, which sometimes requires that religion be treated differently from other subjects, and that public funds should not be granted to religious organizations to promote religious expression. This principle is a key aspect of the Constitution's protection of religion and religious liberty.

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and maintaining the separation of church and state in public education. Member organizations of National PEARL include educational, religious and civic groups with constituencies in each state.

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INTEREST OF AMICUS CURIAE

Council on Religious Freedom ("CRF"), a national, nonprofit organization, exits to uphold and promote the constitutionally protected principle of religious liberty. CRF maintains a major focus on the relationship of free exercise principles to non-establishment concerns in an effort to maximize religious freedom.

CRF files this amicus brief because it believes petitioners seek to distort settled law. Such distortion will undermine this Court's established precedence: the state may not provide direct aid to primarily sectarian organizations for religious purposes.

The parties consented to the filing of this brief in a joint letter of consent submitted to the Clerk of this Court.

SUMMARY OF ARGUMENT

University of Virginia's use of student activities funds to finance the publication of an avowedly religious magazine with a Christian perspective violates the Establishment Clause. To permit expenditures of public monies on such a religious activity runs counter to almost 50 years of U.S. Supreme Court jurisprudence dealing with governmental aid to sectarian organizations. The Establishment Clause principles articulated by this Court have remained consistent, providing basic guidelines to assist in determining the propriety of governmental funding of a program or activity. Finally, the Establishment Clause protects against direct governmental funding of religious activities. The petitioners have failed to identify any basis that would justify an exception to the protection afforded by this Clause.

ARGUMENT

I. PETITIONERS SEEK TO DISCARD NEARLY HALF A CENTURY OF JURISPRUDENCE.

This case erroneously seeks to reverse almost one-half century of Supreme Court reasoning as petitioners urge adoption of "ingenious plans for channelling state aid to sectarian . . . organizations." *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973). Petitioners argue the Establishment Clause would not be offended should the University of Virginia fund proselytizing activities of a sectarian organization. This suspect argument rests on petitioner's claim: "[t]his Court has held in case after case in the last decade that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities." (Petitioners' Brf. at 29).[1]

A logical extension of such an argument would require the University of Virginia to fund an evangelistic crusade by the Reverend Jimmy Swaggart so long as other groups -- sectarian or otherwise -- also received funding for speakers who wished to speak on campus. Fortunately, this Court has never adopted petitioners' erroneous view of the Establishment Clause.

As amicus Christian Legal Society concedes, "government generally should not fund religious functions. Government may sometimes fund secular functions performed

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[1]Petitioners contend religion is not advanced within the meaning of the Establishment Clause even when a sectarian organization is "clearly engaged in the propagation of particular religious doctrines." (Petitioners' Brf. at 32-33).

by religious organizations, but those cases are not precedent for funding religious functions." (Christian Legal Society Brf. at 4). What is absent from petitioners' analyses, or from any supporting amici, is the recognition that for almost 50 years this Court has consistently distinguished between direct and indirect aid to pervasively sectarian organizations. These distinctions confound the petitioners. Without exception, this Court has struck down programs where substantial aid flows directly from a governmental source to a pervasively sectarian organization.

A long-line of Supreme Court cases beginning with *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and continuing to last term's decision in *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994), require rejection of petitioners' argument: breadth of the recipient class makes substantial aid to a pervasively sectarian organization constitutional. These cases clearly show that non-preferential treatment is not the only establishment concern of this Court.[2]

Everson v. Board of Educ., 330 U.S. 1 (1947), found constitutional a local school district program which reimbursed parents for money spent transporting their children to parochial school. This Court distinguished between *indirect* benefit to sectarian schools and *direct* aid provided to parochial schools. Under the school district's program "[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide

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[2]For a historical review of the theory that the Establishment Clause does not prohibit aid to religion on a non-preferential basis -- a theory which has never won majority by this Court -- *see* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* at 91-119 (1986).

a general program *to help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18 (emphasis supplied).

In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld a New York statute requiring local public school authorities to lend textbooks to all students in grades 7 through 12 in both public and private schools. The *Allen* Court, relying on *Everson*, observed "[t]he law merely makes available *to all children* the benefits of a general program to lend school books free of charge." *Id.* at 243 (emphasis supplied). Explaining that the textbook loan program was *not* direct aid to sectarian schools, the *Allen* Court stated:

> Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and *the financial benefit is to parents and children, not to schools*. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Id. at 243-44 (emphasis supplied).

Lemon v. Kurtzman, 403 U.S. 602 (1971), addressed appeals involving two state statutes providing various types of aid to church-related elementary and secondary schools. Pennsylvania's statute provided reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in

specified secular subjects,[3] while a Rhode Island statute allowed the state to pay directly to nonpublic, elementary school teachers, a supplement of 15% of their annual salary. The Supreme Court found both violated the Establishment Clause.

The Court did not focus on the breadth of the recipient class, rather on the nature of the aid. After discussing its concern with the potential for government interference with religion,[4] the Court stated:

> The Pennsylvania statute, moreover, has the further defect of *providing state financial aid directly to the church-related school*. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents -- not to the church-related school [citation omitted]. In *Walz v. Tax Commission*, *supra*, 397 U.S., at 675, the Court warned of the dangers of direct payments to religious organizations: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most

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[3]Of course, the state also, by separate statutes, provided public schools similar financial assistance.

[4]The Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), noted that the Rhode Island legislature was concerned with "the considerable religious activities of the sectarian schools," *id.* at 616, and were thus "led . . . to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education." *Id.*

> government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.

Id. at 621 (emphasis supplied). The Court distinguished *Everson* and *Allen* from the programs at issue in *Lemon* on the basis of the indirectness of the benefit to the sectarian schools, rather than the breadth of the class of beneficiaries.

Justice Brennan recognized in *Lemon* that benefits must be provided equally to students in both public and private schools to insure the aid is neutral as between believers and nonbelievers. However, the breadth of such inclusion alone does not trump the constitutional proscription of direct aid to pervasively sectarian institutions. Reflecting on *Board of Educ. v. Allen*, Justice Brennan observed that the government "could not provide textbooks giving religious instruction." *Lemon*, 403 U.S. at 656. According to Justice Brennan:

> More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U.S., at 244 n.6, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson*, the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children. . . . That [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.

Id. at 656.

When government aid to sectarian schools is indirect and the primary beneficiaries are individual students or their parents, the breadth of the statute may become relevant with regard to whether the program discriminates in favor of or against sectarian groups. But when the benefits flow directly to a pervasively sectarian organization, not to the student or parent, the neutrality of the program as to the recipient becomes irrelevant.[5]

In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court considered a state law providing aid only to nonpublic schools. The Court found the law furthered the state's goal of "extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students who constitute approximately one quarter of the schoolchildren in Pennsylvania." *Id.* at 363. Just because the law provided aid only to sectarian schools was irrelevant to the Court "[s]o long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two." *Id.* at 360 n.8.

However, *Meek* cautioned "[e]ven though earmarked for secular purposes, 'when [the aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion. *Hunt*

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[5]The recent opinion in *Board of Educ. v. Grumet*, 114 S. Ct. 2481, is not at odds with the concept that neutrality is irrelevant when the aid is direct. In *Grumet* the Court did not deal with the issue of providing aid only to sectarian institutions but rather dealt with the issue of whether the state was preferring one religion over another. *Id.* at 2491.

v. McNair, 413 U.S. 734 (1973)." 421 U.S. at 366.

The Court in *Wolman v. Walter*, 433 U.S. 229 (1977), faced a state law providing educational equipment and materials to sectarian schools. The Ohio law attempted to avoid the results of *Meek* by claiming educational equipment and materials were being "loaned" to the students. Thus, the students, and not the schools, were the primary beneficiaries of the program. The Court was not persuaded:

> Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Id. at 250.

In *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Court found unconstitutional two programs (a community education and a shared time) which provided state paid teachers to teach on sectarian school premises. This Court rejected the argument that the primary beneficiaries of the program were the students:

> Petitioners claim that the aid here, like the textbooks in *Allen*, flows primarily to the students, not to the religious schools. Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional materials to religious schools and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. . . . *Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, "the concept of a loan to individuals is a transparent fiction." Wolman v. Walter, supra, at 264.*

Id. at 395-96 (emphasis supplied).

In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court again followed the direct/indirect aid analysis, in sustaining a Minnesota tax deduction permitting parents of both public and nonpublic school students to deduct payments made for student tuition, textbooks, and transportation. In *Mueller* the Court

found significant that "public funds become available only as a result of numerous private choices of individual parents of school-age children." *Id.* at 399. It also found constitutional a state statute providing tax deductions for certain expenses incurred in providing education because "[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488 (1986), the Court found constitutional a state vocational rehabilitation assistance program, which permitted a blind student to receive funds which he used to attend a Christian college. The Court decided "any aid ultimately flowing to the Inland Empire School of the Bible" was not as a "result[] . . . [of] *state* action sponsoring or subsidizing religion." *Id.* (emphasis in original). The Court concluded there was no *direct* aid flowing to the religious school and observed it is "well-settled, . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State. *School Dist. of Grand Rapids v. Ball*, 473 U.S. at 394." *Id.* at 487 (emphasis in original).[6]

According to petitioners, the constitutionality of the funding of proselytizing activities depends upon a single factor -- the breadth of the class of recipients. Petitioners' mantra is "equality." *Bowen v. Kendrick*, 487 U.S. 589 (1988),

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[6]The Court, however, explained that aid may still have the effect of a direct subsidy from the state even though it takes "the form" of aid to students or parents, citing *Wolman* and *Nyquist*. *Witters*, 474 U.S. at 487.

rejected this concept. When addressing a facial attack on the Adolescent Family Life Act in *Bowen*, the Court considered more than breadth of the potential recipients. The Court observed "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that *direct government aid* to religiously affiliated institutions does not have the primary effect of advancing religion." *Id.* at 609 (emphasis supplied). According to *Bowen* "nothing on the face . . . [of the statute] indicates that a *significant proportion* of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* at 610 (emphasis supplied).

Bowen continued its inquiry. After finding the range of potential recipients broad and determining no *significant proportion* of the funds would be disbursed to pervasively sectarian organizations, the Court narrowed its focus on whether the statute was unconstitutional as applied.[7] Finding the record insufficient, it remanded the case to the district court to consider whether the aid had been used for religious activities. *Id.* at 621. Justice O'Connor, concurring in *Bowen*, stated "any use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623.[8] The *Bowen*

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[7]In *Bowen*, 487 U.S. at 601, the Court underscored the importance of the distinction between a "facial" and "as applied" analysis when reviewing a case involving Establishment Clause concerns. *Bowen* involved both types of challenges, while the instant case only involves an "as applied" challenge.

[8]Justice Kennedy, joined by Justice Scalia in a concurrence, concluded the program "is not unconstitutional by reason of the religious character of a specific recipient. The question in an applied challenge is not whether the entity is of a religious character, but how it spends the grant."

Court viewed the programs in *Witters*, *Mueller*, *Allen*, and *Everson* as acceptable because they involved *indirect* grants of governmental aid as distinguished from aid programs involving *direct* grants. *Id.* at 610.

Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), followed the indirect aid cases rationale. There the Court distinguished the direct grant to schools rationale of *Meek* and *Ball* from the attenuated benefits rationale of *Mueller* and *Witters*. *Id.* at 2468-69.

In discussing such attenuated benefits, *Zobrest* observed if the Establishment Clause were to bar religious groups from receiving any general governmental benefits, then a church would not be able to receive police and fire protection or have its sidewalks repaired. The Court then said:

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge *just because sectarian institutions may also receive an attenuated financial benefit.*

Id. at 2466 (emphasis supplied). Of course a finding that the program neutrally provides governmental benefits to a broad class defined without reference to religion does not end the

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Bowen, 487 U.S. at 624-25. Petitioners will spend monies received from the University of Virginia to promote a sectarian agenda and religious doctrine. The money will be spent by the petitioners to promote a sectarian doctrine.

inquiry if the benefit provided to pervasively sectarian institutions is not attenuated as in *Zobrest*, but rather is direct as in the instant case.

Zobrest continued its direct/indirect aid analysis, noting that under the tuition tax deduction statute, "public funds become available to sectarian schools 'only as a result of numerous private choices of individual parents of school-aged children,' thus distinguishing *Mueller* from our other cases involving 'the direct transmission of assistance from the State to the schools themselves.'" *Id.* at 2467.[9]

Zobrest carefully differentiated the attenuated financial benefit which might ultimately flow to parochial schools in the programs at issue in *Mueller* and *Witters* from the direct aid provided in *Meek* and *Ball*. Quoting *Witters*, 474 U.S. at 487, the Court concluded:

> [T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State.

Zobrest, 113 S. Ct. at 2468. Leaving no ambiguity as to the unconstitutionality of a direct subsidy to an elementary or secondary church-operated school, even if benefitting the "secular" courses of the school, the Supreme Court, relying on *Meek*, 421 U.S. 366, stated:

> "Substantial aid to the educational function of

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[9]In analyzing *Witters*, the Court likewise noticed that any aid flowing "to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 2467.

> such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity."

Id. at 2468.

Justice Souter's majority opinion in *Grumet* did not deviate from the Court's earlier analysis. Although the majority recognized the government must not engage in legislative favoritism since the Establishment Clause embraces the view that the state must not favor one religion over another (or favor religious interests over secular interests), such is only the first step in the judicial analysis. *Grumet* explained what the Court meant when in *Bowen* it "upheld a statute enlisting a 'wide spectrum of organizations' in addressing adolescent sexuality because the law was 'neutral with respect to the grantee's status as a sectarian or purely secular institution.'" *Grumet*, 114 S. Ct. at 2492. It thus rejected the concept that neutrality is the sole factor in Establishment Clause adjudication:

> The Court used "sectarian" to refer to organizations akin to this school district in that they were operated in a secular manner but had a religious affiliation; it recognized that *government aid may not flow to an institution "'in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,'"* 487 U.S., at 610 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

Id. at 2492 n.8 (emphasis supplied).

Justices Blackmun, Stevens, O'Connor, and Ginsburg joined Justice Souter in this part of the majority opinion. They agreed a statute may in certain instances properly provide benefits to a wide spectrum of organizations, including organizations operating in a secular manner but having a religious affiliation. Nevertheless when government aid flows to an organization in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, such aid is direct and unconstitutional under the Establishment Clause and a long line of decisions from this Court.

II. THERE IS NO LACK OF CONSISTENCY BETWEEN THIS COURT'S EARLIER AND MORE RECENT AID CASES.

Choosing to ignore this Court's constant reliance on a direct/indirect aid analysis, petitioners allege a lack of consistency between earlier "aid" cases (*Bradfield v. Roberts*, 175 U.S. 291 (1899); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). According to petitioners, these earlier cases "were resolved in favor of the neutral extension of benefits" concept (Petitioners' Brf. at 39) while *Lemon* "inaugurated a period in which the constitutionality of aid was seen to depend not on the neutrality of the government's own allocation of benefits, but on the character of the recipient and the use to which the benefits were put." (*Id.*).

Petitioners cite *Everson* in support of their claim that *Lemon* first expressed concern over the character of the recipient and the intended use of the benefits. Curiously, *Everson* did not focus exclusively on neutrality concerns nor

did it ignore the question of whether public funds were going to be used for sectarian purposes.

Everson held "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." 330 U.S. at 16. The Court found the "'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15.

Everson was not concerned only with preferential aid. It concluded indirect aid provided in the form of private transportation funds to parents was "so separate and so indisputably marked off from the religious function" of the sectarian schools as not to constitute aid to religion. Not a single justice suggested, as do petitioners, because transportation funding was provided to both public and nonpublic school students, the character or purpose of the aid was irrelevant.

In *Board of Educ. v. Allen*, 392 U.S. at 241-42, the Court relying on *Everson* determined "the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another,' and bars too any 'tax in any amount, large or small . . . levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'"

In *Allen* the Court did not ignore the no-aid principle. Rather, it recognized while "*Everson* and later cases have shown that the line between state neutrality to religion and

state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State.'" *Id.* at 242. *Allen's* evaluation concluded there was no evidence of the textbooks being designed to promote any religious teaching. Accordingly, the Court declined to find the "statute results in unconstitutional involvement of the State with religious instruction." *Id.* at 248.

Likewise in *Walz*, the Court refused to end its inquiry with a neutral extension of benefits analysis. It concluded the aid was not direct because "the government does not [by permitting a real property tax exemption] transfer part of its revenue to churches but simply abstains from demanding that the church support the state." 397 U.S. at 675. The Court found such tax exemptions reduced, rather than enlarged, any "fiscal relationship between church and state." *Id.* at 676.

Concurring in *Walz*, Justice Brennan noted:

> Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempt enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, "[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income

> independently generated by the churches through voluntary contributions." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv. L. Rev. 513, 553 (1968). . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.

Id. at 690-91. Justice Brennan also noted in *Walz*, *id.* at 690, that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." Clearly, funding by the University of Virginia of a purely religious magazine would constitute a direct subsidy of religious activities, suspect under this Court's teaching in *Walz*.

Petitioners' reliance on *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), to support their claim "that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities" is likewise misplaced. (Petitioners' Brf. at 29). The Court in *Texas Monthly*, *id.* at 12-13, carefully pointed out that in *Walz* "[n]o particular activity of a religious organization -- for example, the propagation of its beliefs -- [was] specially promoted by the exemptions," citing *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

Nor does *Bradfield v. Roberts*, 175 U.S. 291 (1899), cited by petitioners, support their view that the neutrality component of the Establishment Clause nullifies the no-aid principle. The Court in *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988), squared the Court's *Bradfield* holding, affirming the principle enunciated in *Hunt v. McNair*, 413

U.S. 734, 743 (1973):

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

While petitioners quote Justice Powell's concurring opinion in *Witters* to support their claim that in an "as applied case the Court must look only at the use of the funds as a whole -- never at a specific application," they miss the thrust of Justice Powell's concern. Justice Powell relied upon the Court's analysis in *Mueller v. Allen*, 463 U.S. 388 (1983), as applied in *Witters*: "[A]id to religion [which] results from the private choices of individual beneficiaries" was not unconstitutional. *Witters*, 474 U.S. at 490-91. According to Justice Powell in *Mueller*, the Court did not "analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we look to the nature and consequences of the program *viewed as a whole*." (Citation omitted.) *Id.* at 492 (emphasis in original). Once again the focus is on the entire program not just its application.

Justice Powell's comments pertained only to such indirect aid as bus transportation in *Everson* or textbooks provided in *Allen*. His reference to *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780-89 (1973), makes such a conclusion abundantly clear.

This understanding of Justice Powell's views in *Witters* is consistent with his clearly articulated view of the no-aid principle stated in *Wolman v. Walter*, 433 U.S. 229, 263-64

(1977) (Powell, J., concurring in part and dissenting in part). His opinion in *Wolman* was aimed at explaining his approval of textbooks to students in *Allen* and his objection to lending instructional materials and equipment to sectarian schools in *Meek v. Pittenger*, 421 U.S. 349 (1975). Significantly, Justice Powell observed "the Court reaffirmed *Allen*, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- *so long as the aid is incapable of diversion to religious uses* [citation omitted] *and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions.*" *Id.* at 263 (emphasis supplied). Thus, Justice Powell was concerned both with whether the aid was provided directly to a pervasively sectarian organization and whether the aid was divertable to religious activities.

Justice Powell's no-aid analysis, like a thread, runs through this Court's establishment jurisprudence from *Everson* to *Zobrest* to *Grumet*. As the Court stated in *Meek*, 421 U.S. at 364-65:

> It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The *indirect and incidental benefits* to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. . . . [Citations omitted; emphasis supplied.]

Even in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), the lone decision permitting cash payments to sectarian schools, the Court found aid for religious teaching unacceptable. Basing its decision on *Wolman v. Walter*, the Court stated:

> "[t]he nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of the religious teaching," *ibid*, thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes."

Id. at 656.

Thus, arrangements which this Court found constitutional in *Regan* did not displace the line of cases where the Court found direct financial subsidies to be forbidden by the Establishment Clause. The payment by the University of Virginia to petitioners would constitute such direct financial subsidies.

III. THE ESTABLISHMENT CLAUSE STANDS AS AN IMPENETRABLE WALL AGAINST DIRECT FUNDING OF A SECTARIAN ORGANIZATION'S RELIGIOUS ACTIVITIES.

The University of Virginia is asked to provide direct financial aid to a sectarian organization that aspires to use public monies to proselytize. Such funding of a purely religious activity falls within the Establishment Clause

proscription because *substantial aid* flows *directly* to a *sectarian organization* for a *sectarian purpose.*

Amicus and petitioners agree the Establishment Clause limits only the power of government. But the government cannot be compelled to provide public funds to pervasively sectarian organizations particularly when such funds will be used for religious purposes. Petitioners would have the Free Exercise, Free Speech, Equal Protection, and Free Press Clauses of the First Amendment devour the Establishment Clause (Petitioners' Brf. at 22-23).

In *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), this Court affirmed a lower court decision which found a prohibition against use of public funds to aid religious schools constitutional. The next year in *Norwood v. Harrison*, 413 U.S. 455 (1973), this Court considered a case in which the State of Mississippi purchased textbooks and lent them to students in both public and private schools without regard to whether any participating private schools had racially discriminatory policies. This Court concluded the state is not required by the Equal Protection Clause to provide assistance to private schools in an equal manner to public schools. Chief Justice Burger wrote:

> Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian

> schools in some circumstances -- health care or textbooks, for example -- *a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.*

Id. at 462 (emphasis supplied).

Norwood, following the direct/indirect aid analysis, concluded *Everson* and *Allen* were "carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests. *Id.* at 468. The Court stated: "States may assist church-related schools in performing their secular functions [citations omitted] . . . because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Id.*

The *Norwood* Court acknowledged:

> [D]ecisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clauses. [Citation omitted.] This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such

> assistance touches on the conflicting values of the Establishment Clause by *indirectly benefiting* the religious schools and their sponsors.

Id. at 469 (emphasis supplied). *See also Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974).

Petitioners acknowledge inferentially that government may deny a benefit to a person because of the content of his speech if the government's interest is compelling (Petitioners' Brf. at 15). This Court in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 80 (1985), found -- even in a traditional public forum -- speakers can be excluded "when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." When direct funding for proselytizing is exacted, the University of Virginia has a compelling interest to deny such funding under the Establishment Clause.

Petitioners rely on *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), in asserting the Establishment Clause is not a bar to a free speech claim (Petitioners' Brf. at 25). However, these cases fail to support such an argument.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court concluded providing students with "equal access" to university facilities was only an incidental, indirect support of religion. *Id.* at 273, 274, and 275. Such support did not raise Establishment Clause concerns. Likewise, in *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), Justice Kennedy, joined by Justice Scalia, concluded the "equal access" statute providing for non-discriminatory student initiated and student led

religion clubs at high schools provided only "incidental benefits" to religion. *Id.* at 260.[10]

The matter on appeal involves more than accommodating the needs of students for campus access. Here the petitioners demand the University of Virginia fund the sectarian organization's religious indoctrination of other students. The university's action becomes direct. As such, it raises those concerns expressed by Justice White in his *Mergens* dissent concerning whether "a state university that pays for basketballs for the basketball team is . . . thereby required to pay for Bibles" for a religious organization. *Id.* at 287.

The Establishment Clause prohibits the use of public funds to directly pay for a Mass on a university campus held by the Newman Club. In fact, the line drawn in *Witters*, 474 U.S. at 481, still controls: "The State may not grant aid to a religious . . . [organization], whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious . . . [organization] from the State." (If the university has violated the non-establishment proscription with regard to

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[10]*Lamb's Chapel* did not involve direct aid to a sectarian organization. In rejecting the Establishment Clause defense, this Court referred to its decision in *Widmar*. It observed "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment." *Id.* at 2148. But the Court then noted that as in *Widmar* "permitting use of university property for religious purposes under the open access policy involved would not be incompatible with the Court's Establishment Clause cases." *Id.* Thus, the Court in *Lamb's Chapel* followed the direct/indirect aid analysis.

other groups, the solution is not to lower the wall; rather, to prohibit all future violations. Prior university violations of the Constitution cannot be used to justify further violations of the Establishment Clause.)

Petitioners can't comprehend the Establishment Clause's requirement that relationships between the state and pervasively sectarian organizations are fundamentally different from the state and secular entities. As Professor Carl H. Esbeck wrote in *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 371 (1984):

> *The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment*. For example, although the Amendment deals only by implication with associational rights, the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility). The place of religious institutions, therefore, has long been recognized as a special problem for which the establishment clause makes special provision. [Emphasis supplied].

The function of the Free Exercise Clause was not intended to breach the co-equal no-establishment proscriptions of the Establishment Clause:

> The Supreme Court has largely confined

> the application of the free-exercise clause to the protection of individual conscience against government abuses. This limiting construction by the Court is correct lest the clause become a ready excuse by anyone wanting to avoid the duties of citizenship. Thus, the task of governing the functional separation of church and state is properly left to the establishment clause. *Maintaining the integrity and independence of religious organizations requires that government neither be involved in worship nor become an agent for achieving sectarian propagation and inculcation. This is what it means for the state to be neutral.* Moreover, this structural separation of church and state not only guarantees an autonomous church but accrues to the benefit of individual religious liberty by ensuring that a person's government is not aiding a religion he or she does not share.

Esbeck, Carl, *The Establishment Clause: Assuring the Independence of Churches and a Neutral State*, Government Intervention in Religious Affairs, II 40, 55-56 (Dean M. Kelley ed., 1986) (emphasis supplied).

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit must be affirmed.

Dated: January 17, 1995

Respectfully submitted,

LEE BOOTHBY
Counsel of Record
Boothby & Yingst
4545 42nd St., NW, Suite 201
Washington, DC 20016
(202) 363-1773

Counsel for Amicus Curiae
Council on Religious Freedom

Of Counsel:

Walter E. Carson
917 Daleview Drive
Silver Spring, MD 20901

Harold J. Lance
Rt. 3, Box 350
Dunlap, TN 37327

Robert W. Nixon
12501 Old Columbia Pike
Silver Spring, MD 20904

Rolland Truman
4522 Greenmeadow Road
Long Beach, CA 90808

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Supreme Court of the United States

October Term, 1994

Rosenberger, et al.,
Petitioners,

v.

Rector and Visitors of University of Virginia,
Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

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U.S. 490 (1989) 8

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Widmar v. Vincent, 454
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STATUTES:

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OTHER AUTHORITIES:

Tribe, L., *American Constitutional
Law* 782 (2d ed. 1988) 8

No. 94-329

In the

Supreme Court of the United States

October Term, 1994

Rosenberger, et al.,
Petitioners,

v.

Rector and Visitors of University of
Virginia,
Respondents.

BRIEF *AMICUS CURIAE* OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF RESPONDENTS

This brief is filed with consent of both parties. Agreement of consent is on file with the Clerk of this Court.

INTEREST OF *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

This case concerns school districts in perhaps a more vital way than colleges and universities because the educational mission of public schools depends on the flexibility to decide which activities should be supported and sponsored by the school as consistent with their educational mission and which should not. The interpretation of the free speech clause by the court below seriously erodes that flexibility.

ISSUE PRESENTED FOR REVIEW

Whether the free speech clause of the First Amendment requires a public university

or school to fund all student speech if it funds any.

ARGUMENT

I. Introduction.

Amicus agrees with the lower court's analysis of the establishment clause, but submits that the analysis was unnecessary because no duty existed under the free speech clause requiring the University to fund Petitioners' publication.

Amicus submits that the Fourth Circuit's finding regarding the application of the free speech clause in this case should be overturned, thus precluding the need to decide the establishment clause issue.

II. Schools should be allowed to restrict their financial support and sponsorship to activities which promote their educational mission. The support of one set of student activities does not implicate a free speech right to receive support for other student activities.

A. The aid at issue here is by government designation a restricted benefit, and therefore, no free speech rights should attach.

The aid at issue here is not general aid for one purpose (*e.g.*, government employment) conditioned on the relinquishing of a constitutional right (*e.g.*, right to speak on matters of public concern). This case involves financial assistance supporting speech itself. The government does not require the petitioners to relinquish their right to speak; nor are they entitled to receive the government assistance unless their activity meets the eligibility criteria of the funding program.

The University's decision to establish eligibility criteria for the receipt of funds directly in support of speech can be analogized to the government's decision to designate use in "limited public forum" cases. "Limited public forum" analysis may be applied in cases where the government has elected to open an otherwise closed forum (or its purse) for public discourse even though it had the option of restricting speech on the basis of

content. This contrasts with traditionally public forums, such as public parks, where the government can limit speech based only on "time, place and manner." In "limited public forum" cases, the Court looks first at the nature of the "forum," *i.e.*, the parameters of use set by the government and, second, the particular speech in question and whether it fits into those parameters. For example, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 267 (1988), this Court held that students do not have a free speech right in their articles written for a school sponsored newspaper.

> [W]e conclude that the standard articulated in *Tinker* [*infra*] for determining when a school may punish student expression need not also be the standard for determining when a school may refuse dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 272.

Similarly, schools should not be forced to sponsor organizations or to financially support the activities of organizations that do not conform to the educational mission of the school. Just as the Hazelwood school district cannot be forced to sponsor student speech through its own newspaper, the University of Virginia cannot be forced to sponsor student speech by financing a student publication.

This case differs from *Widmar v. Vincent*, 454 U.S. 263 (1981), where a school opened its facilities for general use by the student body and thus was precluded from denying access to a religious group based on the content of speech. Similarly, this is not a viewpoint discrimination case like *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993), where a school opened its facilities for discussion of family values but precluded the plaintiffs from discussing the subject

from a Christian perspective, although *amicus* submits that a school could restrict its financial largess to a particular viewpoint.

The government's use of content-related distinctions as a basis for determining whether to support a particular group or activity was upheld by this Court in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). In *Regan* this Court held that the federal government may provide a tax exemption solely for groups that lobby on behalf of veterans' interests, while denying such an exemption to other organizations devoted to activities protected by the First Amendment. The Court rejected the notion that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* at 548. Rather, in the benefit context, the only inquiry is whether the distinction has a rational basis, it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by

charities generally, it will subsidize lobbying by veterans' organizations." *Id.* at 550. *See also Maher v. Roe*, 432 U.S. 464, 475 (1977); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

This Court's jurisprudence in other cases also supports the University's decision not to subsidize petitioner's speech.

> [T]he fact that government *may not penalize* exercise of a right by withholding an otherwise discretionary benefit does not imply that government *must subsidize exercise* of the right. Thus, although *Planned Parenthood* [*Babbitt v.*, 107 S.Ct. 391 (1986)] makes it clear that those who undergo, perform, or counsel abortion may not be required to cease those activities as a condition of receiving public funding for their other activities, it certainly does not follow that government must pay for abortions or abortion counseling.

L. Tribe, *American Constitutional Law* 782 (2d ed. 1988).

In *Rust v. Sullivan*, 111 S.Ct. 1759 (1991), this Court upheld a restriction in regulations of the Department of Health and

Human Services under Title X of the Public Health Service Act prohibiting use of family planning funds appropriated under the Act for abortion counseling. The Court distinguished *Perry v. Sinderman*, 408 U.S. 593 (1972), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), cases on which the Fourth Circuit relied here:

> [T]he Government here is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. . .In contrast, our "unconstitutional conditions" cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

111 S.Ct. at 1774.

The circumstances in this case are vastly different from the so-called "government-generated benefits" cases cited by the Fourth Circuit. In those cases the government attempted to deny some general aid such as

government employment in *Perry v. Sinderman*, 408 U.S. 593 (1972), and government unemployment benefits in *Sherbet v. Verner*, 374 U.S. 398 (1963), on the basis of some unconnected speech or activity occurring outside the scope of the benefit program. In the instant case, the University has placed no prohibition on the Petitioner's protected free speech rights. Petitioners are permitted to use University facilities, they have access to University printing equipment and they are permitted to distribute their materials on campus. The University has simply declined to provide funding from a limited student activities fund for the students' religious publication. Unlike the cases cited by Petitioners, the University's refusal to subsidize religious, political and social speech and activities is based upon a legitimate relationship between the funding decision and the benefit at issue.

In *Harris v. McRae*, 448 U.S. 297, 318 (1980), this Court held that the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of [a constitutional] freedom." In that case the Court upheld a provision in the Social Security Act restricting funding of abortions.

> It cannot be that because government may not prohibit the use of contraceptives, *Griswold v. Connecticut*, [citation omitted], or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, [citation omitted], government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

448 U.S. at 318 (1980).

Likewise, the fact that a school cannot prohibit a student from wearing an armband in protest of the Viet Nam War, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not mean that the school must fund a newspaper advocating or

protesting this country's presence in Viet Nam. While a public employee cannot be penalized for publicly criticizing the university administration, *Perry v. Sinderman*, the university cannot be required to fund the criticism.

Schools should be allowed to make educational determinations as to which of many competing educational activities to fund. It is not unusual at the elementary and secondary level, for example, for schools both to restrict facilities and decline to sponsor organizations that are not related to their educational mission. It cannot be the law of the land that schools are required to sponsor through faculty advice and participation, through funding or otherwise, partisan political groups, hate groups like the Ku Klux Klan or controversial groups such as those espousing right to life and pro-choice. The nature of the parameters of the forum will establish whether a particular group must be

allowed to *meet* on school grounds. But there is no requirement that the school *sponsor* a group merely because it sponsors other groups. Similarly, the free speech clause does not require that the school provide funding to a group merely because it funds another group.

It is also important to note that because the University requires all students to contribute to the student activities fund, the school has an ethical, if not legal, obligation to support only those activities which fit into the educational mission of the school. In *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), this Court held that an "agency shop" arrangement where the employer deducts a "service fee" from the salaries of nonmember teachers equivalent to the amount of the union dues does not violate the First Amendment to the extent the fees are used for collective bargaining, contract administration and grievance adjustments purposes but are unconstitutional to the extent the fee is used

for ideological causes not related to collective bargaining. Similarly, in the case at bar it is appropriate that the University decided that the limited funds in the student activities account should not be used for ideological causes such as political and religious speech or for social activities and, instead, should be reserved for educational matters. Certainly, political or religious subjects may be appropriate subjects to teach *about* in a political science or religion course, but a school teaching about religion or politics is far different from requiring a school to finance partisan political speech or sectarian religious speech.

It is interesting to note that the Fourth Circuit in its discussion of the establishment of religion issue pointed out that by funding Petitioners' publication, the University would indicate that it is promoting the message in the publication.

> **Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize the publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values.**

18 F.3d 269, 286 (4th Cir. 1994).

The court may or may not be correct in its conclusion that such a signal is sufficient to establish religion, but it is certainly sufficient reason to justify, under the free speech clause, the University's decision not to fund the activities.

B. Schools may restrict use of their facilities for specific purposes, even where the question of sponsorship or funding is not an issue.

Lamb's Chapel, 113 S.Ct. 2141 (1992), presented two issues: first, whether school districts may restrict the use of their facilities on the basis of subject matter; and second, once the facilities are opened for discussions on a particular subject, whether

they may limit discussion to a particular viewpoint. This Court answered the first question "yes" and the second one "no."

In *Lamb's Chapel*, a religious organization sought to use school facilities to show a film on family values "from a religious perspective." Since the district allowed other organizations to address that subject, the Court held that it could not discriminate against Lamb's Chapel because of its religious viewpoint. The group also contended that the district engaged in forbidden subject matter discrimination because it "opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional restrictions in traditional public fora, such as parks and sidewalks." 113 S.Ct. at 2146. Because the Court based its decision on viewpoint discrimination, it did not address that issue. However, it did

note: "There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. [Citations omitted.]" *Id.*

The Fourth Circuit's decision held that the University's refusal to fund Petitioner's publication discriminated on the basis of content rather than viewpoint. But, this Court has held that a public entity is entitled to discriminate on the basis of content in deciding whether to open its otherwise closed forum, although arguably if the number of subjects is broad enough, courts may be called upon to determine whether the school's limited public forum argument is a subterfuge. Thus, were this a facilities case like *Lamb's Chapel*, the court would have to make a finding of fact on the question of whether the facilities are "open." Of course, in the instant case the University, like the university in *Widmar v. Vincent*, has no

subject matter restriction on use of its facilities, the only restriction is that the membership of the group be limited to students. All student organizations, including Petitioners, are allowed to meet.

In *Westside Community School Board v. Mergens*, 496 U.S. 226 (1990), this Court ruled that under the Equal Access Act, 20 U.S.C. 4071, a secondary school must allow all groups to meet on school grounds if it operates a "limited open forum," defined as one in which one or more "non curriculum-related" groups are allowed to meet. The Court in *Mergens* interpreted the phrase "curriculum related" narrowly so as to include only those groups concerned with subjects covered by or required for a course or for which extra credit is given. However, the Court stated that the Act's definition of "limited open forum" is not necessarily coextensive with the free speech clause. Thus, under the free speech clause a school would not turn its facilities

into an "open forum" for the broad use of all students merely because it opened it to clubs which further the educational mission of the school, even though the subjects of the clubs are not offered in a course.

Furthermore, and more in line with the facts in this case, even where the school allows a broad range of clubs to meet on school grounds, the school still retains the option to *sponsor* only those clubs that relate to the educational mission of the school. It would be totally inappropriate to require a school to either sponsor no clubs or to sponsor all. The school may be required because of the nature of its forum to open its facilities to student groups like the Ku Klux Klan, the Young Democrats, the Young Republicans and the Young Moonies, but it is totally inappropriate to require the school to *sponsor* the organizations, provide faculty advisers (as opposed to mere monitors) and, in effect, *endorse* the philosophy of the clubs.

Yet that would be the result if the Fourth Circuit's decision on free speech in this case is allowed to stand.

C. The unique mission of educational institutions, particularly those at the elementary and secondary level, requires flexibility to determine what activities to sponsor and to fund.

This Court has consistently held that students' rights in the context of the public schools "are not automatically coextensive with the rights of adults in other settings." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506. A school need not tolerate speech which is "inconsistent with its educational mission," *Fraser*, 478 U.S. at 685, "even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266.

These cases are instructive because they illustrate the importance of local educational

decision-making and the crucial difference between merely accommodating the speech of all students in the context of a forum open to all students or the speech of individual students in the *Tinker* context, and sponsoring the speech. The former is required and the latter is not.

CONCLUSION

Amicus submits that the Fourth Circuit's decision should be affirmed but not for the reasons stated in its opinion. No free speech rights were implicated in this case and,

therefore, the University may constitutionally decline to fund Petitioners' publication.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director